NYSBA

SPRING 2004 | VOLUME 15 | NO. 1

Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association

Remarks From the Chair/Editor's Note

It is both an honor and a pleasure to serve as the Chair of the EASL Section for 2004 through 2006. Jeff Rosenthal, a hard act to follow, set an excellent example of how to be an effective and organized leader. I look forward to continuing to work with him and the Executive Committee for the upcoming term.

The officers joining me for the 2004 to 2006 term are as follows: Alan Barson, former EASL Secretary and current Vice-Chair; Steve Richman, Secretary, who will also continue to serve as EASL's Delegate to the House of Delegates; Steve Rodner, who will continue as Treasurer; and Ken Swezey, who will continue as Assistant Secretary. We also have a few new names on our Executive Committee roster: Jennifer Romano and Aaron D. Rosenberg are the new Co-Chairs of the Young Entertainment Lawyers Committee, and Gary A. Hall is our new Fifth District Representative. I look forward to working with all of them.

As you will see from the transcript included in this issue of the *Journal*, we had a very successful Annual Meeting. The panelists presented interesting and thought-provoking opinions on topics that covered a broad range of EASL member practice areas. The speakers participated in two panels, "Producing in the New Millennium, Challenges and Opportunities" and "Labor Relations in the Sports, Theatre and Movie Industries." The room was packed throughout, often with standing room only.

The EASL Section Committees were also very active during the early months of 2004. Judith Prowda, Chair of the Committee on Fine Arts, organized a superb program that took place in January at the Chelsea Art Museum, entitled "Collecting and Importing Art from Russia and the Former Soviet Union: A Collector's Perspective." Alan Hartnick, Chair of the Copyright and Trademark Committee, presented a CLE program in

Inside

NYSBA

February in conjunction with Jay Kogan's New York Chapter of the Copyright Society of the U.S.A., entitled "Achtung Baby: Germany, Europe and the Long Reach of International Copyright Law." As always with these two organizers, the program was very well-attended and received. Finally, also in February, Ayala Deutsch's Sports Committee co-sponsored (and Ayala was a panelist for) an interesting CLE program organized by St. John's University School of Law for its Sports Law Symposium.

As you know by now, based on information disseminated via e-mails, mailings and our Web site, our Spring Conference will be taking place on April 23rd and 24th at the Doral Arrowwood Resort in Rye Brook. Jay Flemma and Kenny Nick, our Program Co-Chairs, have worked hard to organize a comprehensive program that encompasses various areas of interest to our membership, including topics such as: Cross-promotional deals in the sports and entertainment industries, conflicts of interest in the entertainment industries, and breakout sessions focusing on television, copyright and trademark litigation, music publishing and issues of concern for young lawyers. Seven CLE credits will be available in practical skills and ethics, among other areas, and our Young Entertainment Lawyer Committee Co-Chairs are working with Cameron Myler, our CLE Compliance Officer, to ensure that for the Young Lawyers portion of the program, Bridge the Gap CLE credits will be offered.

Now I am going to put on my Editor's hat and briefly describe what you will find in this issue of the *Journal*.

Our Law Student Initiative writing contest, which is designed to showcase the talents of law students to practitioners in the entertainment, arts and sports law communities and shed light on students' diverse perspectives in these practice areas, once more received several excellent submissions on a wide variety of topics. Tara DiLuca, a third year law student at Pace Law School, and Adam Zia, a third-year law student at Fordham School of Law, have been selected as this issue's LSI winners. Tara writes about tort liability in sports and Adam writes about New York's approach (or lack thereof) to right-of-publicity issues. As a result of their high quality submissions, the LSI winners will receive a free membership to the EASL Section next year and an opportunity to reach out to Section members with their writing and analytical talents.

I am also extremely pleased that, in addition to the Annual Meeting transcript, this issue of the *Journal* publishes several articles that encompass the fields of entertainment, arts and sports law.

Once more, please be advised that authors can obtain CLE credit from having an article published in the *EASL Journal*. To submit an article or Letter to the Editor, please e-mail either to me at eheckeresq@yahoo.com. THE NEXT DEADLINE IS MONDAY, MAY 24, 2004.

Elissa

Elissa D. Hecker is Associate Counsel to The Harry Fox Agency, Inc., licensing affiliate of The National Music Publishers' Association, Inc., where she is involved with legal, educational and policy matters concerning the world's largest music rights organization and the U.S. music publishing industry trade group. In addition to membership in the NYSBA, Ms. Hecker is also a member of The Copyright Society of the U.S.A. and Chair of the FACE Initiative children's Web site.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at non-lawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authorized publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: http://www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Congratulations to the Law Student Initiative Selected Authors:

Tara Di Luca of Pace Law School, for
"Tort Liability in Sports Products Liability"

and

Adam Zia of Fordham School of Law, for
"'Til Death Do Us Part?: New York's Failure to Grant Deceased Celebrities a Right of Publicity"

****

New York State Bar Association
Entertainment, Arts and Sports Law Section

Law Student Initiative

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association has an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL Web site. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section members.

Law school students who have interests in entertainment, arts and/or sports law and who are members of the EASL Section are invited to submit articles. This initiative is unique, as it grants students the opportunity to be ***published and gain exposure*** in these highly competitive areas of practice. The *Journal* is among the profession's foremost law journals. Both it and the Web site have wide national distribution.

****

To foster interest in entertainment, arts and sports law as a career path, the EASL Section invites law students who are Section members to participate in its Law Student Initiative:

Requirements

- Eligibility: Open to all full-time and part-time J.D. candidates who are EASL Section members
- Form: Include complete contact information; name, mailing address, law school, law school club/organization (if applicable), phone number and e-mail address. There is no length requirement, but any notes must be in *Bluebook* endnote form.
- Deadlines: Submissions must be received by **May 24, 2004.**
- Submissions: Articles must be submitted via a Word e-mail attachment to eheckeresq@yahoo.com or accompanied by a hard copy and on a diskette in Word to:

  Elissa D. Hecker, Esq.
  51 West 86th St., 405
  New York, NY 10024

Topic

Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, arts and sports law fields.

Judging

Submissions will be judged on the basis of quality of writing, originality and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *Journal* and on our Web site, and all winners will be announced at the EASL Section Annual Meeting.

EASL Pro Bono Update

The term pro bono is derived from the Latin phrase pro bono publico, *meaning "for the public good." For the past two years, the EASL Section has made a conscious effort to support the public good by encouraging its members to donate their time and expertise to low-income individuals and nonprofit organizations.*

Our hope for 2004 is that our members will continue to volunteer in the community with the aim of meeting the State Bar's aspirational goal of 20 hours of pro bono work per year. As New Yorkers, we have a special connection with the entertainment, arts and sports communities, and there are many organizations right in our backyard for which we can volunteer our time. I look forward to a year of doing great things for the public good as a Section!

Elisabeth K. Wolfe
NYSBA EASL Pro Bono Chair

More EASL/VLA Clinics Slated for Spring 2004

In 2002, EASL announced a collaborative arrangement with Volunteer Lawyers for the Arts (VLA). VLA has been helping artists and arts organizations with their arts and entertainment-related legal issues for nearly 30 years.

VLA and EASL continue their collaboration for the 2004 year with two clinics, on February 18th and May 19th.

At the clinics, attorneys are paired up with VLA members seeking advice on various entertainment issues, for half-hour sessions. All clinics are held from 4 p.m. to 7 p.m. at Volunteer Lawyers for the Arts, 1 East 53rd Street, 6th Floor. To sign up for future EASL clinics, e-mail Elisabeth Wolfe at elkwolfe@aol.com. For more information about other VLA programs, please contact Elena Paul at epaul@vlany.org.

EASL to Help Ice Hockey in Harlem

Ice Hockey in Harlem (IHIH) is an innovative, unique, not-for-profit, privately supported after-school education program empowering youth in the Harlem community. IHIH attracts inner-city youth to a sport that may otherwise not be accessible to them. Once enrolled, participants have opportunities for improved schooling, social service, access to mentor relationships and instruction in important life skills. Available to children aged 4 through 17, IHIH has successfully supported hundreds of children and their families since its inception in 1987. All services are offered to participants at no cost to their families or the agencies from which they are recruited.

EASL is working with IHIH to recruit successful men and women to speak in an enrichment series geared toward IHIH's 14- to 17-year-old players. This series will involve several workshops and activities that will explore a range of topics, including life experiences, career development and financial literacy. IHIH is especially seeking minority attorneys who are willing to share their stories about their paths to success. If you are interested, please contact Elisabeth Wolfe at elkwolfe@aol.com.

IHIH awards one student each month with the IHIH "Student Athlete of the Month" award, based on the selection of an IHIH teacher who selects one student who has had excellent attendance and great classroom participation. With the help of generous donors and sponsors, IHIH is able to offer our "Student Athletes" with tickets to area sporting events. If you are interested in helping IHIH secure tickets as well as other fun donations for its shining athletes, or if you are interested in receiving more information about how you can get involved, please contact Caroline Baumis at (212) 722-0044.

"Our hope for 2004 is that our members will continue to volunteer in the community with the aim of meeting the State Bar's aspirational goal of 20 hours of pro bono work per year."

In the Spotlight—The Songs of Love Foundation

The Songs of Love Foundation is a nonprofit 501(c)(3) organization devoted to writing and recording personalized songs for children and teenagers who are either chronically or terminally ill. Each patient receives a CD or cassette of his or her own song, free of charge, with original melody and lyrics based on profiles submitted to Songs of Love by hospitals and families. Every "song of love" is one of a kind and is never duplicated. Songs of Love is the only organization in the country performing this important and innovative work. Since its inception in February 1996, Songs of Love has produced over 4,700 songs for more than 300 hospitals across the United States. Over 350 songwriters and singers have participated in this ongoing project.

Nancy Sinatra, Tony Asher (co-writer with Brian Wilson on the Beach Boys' *Pet Sounds*), David Lee Roth, Michael Bolton, Itaal Shur (co-writer on Grammy Award-winning Song of the Year "Smooth"), Jamie Lynn-Sigler (Meadow Soprano on "The Sopranos"), Wally Kurth (Ned Ashton on "General Hospital"), daytime Emmy Award-winning actress Martha Byrne (Lily/Rose on "As The World Turns") and the cast of the Broadway Show *Titanic* have been among some of the many artists who have volunteered their talents. Billy Joel has recorded a spoken introduction. Songs of Love has been profiled on CNN, "60 Minutes," the "Today" show, the "Rosie O'Donnell Show," "Inside Edition," FOX "After Breakfast," *Extra!*, *Good Housekeeping*, *People*, *Biography*, and *Parade* magazines and the *New York Times*.

Songs of Love believes that there is no stronger way to bring smiles to the faces of sick children than to honor them with their very own songs. Children typically tend to play the tapes over and over again. The enthusiasm, beauty, and spirit reflected in each song also touches the lives of family members, friends and hospital staff, and soon everyone finds themselves singing along with the music. A recent article in *Intouch*, a cancer prevention magazine, stated: "Young patients endure invasive procedures without anesthetics thanks to the comfort their 'songs of love' provide." The ongoing therapeutic value of each composition deeply affects not only the child, but also everyone else who has been affected by the patient's struggle with illness. The songs move beyond one event, and capture the beauty and spirit of each child as they provide lasting joy and encouragement.

If you are interested in learning more about Songs of Love, visit its Web site at http://www.songsoflove.org.

We're Exploring!

The Pro Bono Committee is actively exploring additional entertainment, arts or sports-related non-profit organizations based in New York State that could benefit from a collaborative relationship with EASL. If you know of nonprofit organizations that would benefit from a relationship with EASL, please e-mail **Elisabeth Wolfe at elkwolfe@aol.com**.

The Phil Cowan Memorial/BMI Scholarship

It's happening! Law students, take note: Prospective donors, take note: The Entertainment, Arts and Sports Law Section of the New York State Bar Association, in partnership with BMI, the world's largest music performing rights organization, has just established the Phil Cowan Memorial/BMI Scholarship! Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial/BMI Scholarship fund offers *up to two awards of $2,500 each on an annual basis* in Phil Cowan's memory to a law student who is committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The first of the Phil Cowan Memorial/BMI Scholarships will be awarded at EASL's Annual Meeting in January 2005.

The Competition

Each Scholarship candidate must write an original paper on any legal issue of current interest in the area of entertainment, art or sports law.

The paper should be twelve to fifteen pages in length, double-spaced and including footnotes, in *Bluebook* form. All papers should be submitted to designated faculty members of each respective law school. All law schools will screen the papers and submit the three best to EASL's Phil Cowan Memorial/BMI Scholarship Committee. The Committee will read the papers submitted and will select the Scholarship recipient(s).

Eligibility

The Competition is open to all first- and second-year day law students and all first-, second, and third-year evening law students attending "qualified" law schools. "Qualified" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seaton Hall Law School in New Jersey, and up to ten other accredited law schools throughout the country to be selected, at the Committee's discretion, on a rotating basis.

Yearly Deadlines

- **April 30th:** Submission of student papers to respective law schools for initial faculty screening
- **June 1st:** Submission by screening faculty of 3 best papers to EASL's Scholarship Committee
- **Oct. 31st:** EASL/BMI Scholarship Committee will determine the winner(s)

The winner will be announced, and the Scholarship(s) awarded at EASL's January Annual Meeting.

Prerogatives of EASL/BMI's Scholarship Committee

The Scholarship Committee is composed of all former Chairs and the current Chair of the EASL Section. Each winning paper will be published in the *EASL Journal* and will be made available to EASL members on the EASL Web site. BMI reserves the right to post each winning paper on the BMI Web site, and to distribute copies of each winning paper in all media. The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and to the EASL Web site. The Scholarship Committee also reserves the right to award only one Scholarship or no Scholarship if it determines, in any given year that, respectively, only one paper, or no paper is sufficiently meritorious. All rights of dissemination of the papers by each of EASL and BMI are non-exclusive.

Payment of Monies

Payment of Scholarship funds will be made by EASL/BMI directly to the law school of the winner, to be credited against the winner's account.

Donations

The Phil Cowan Memorial/BMI Scholarship Fund is pleased to accept donations. The donations are tax-deductible. All donations should be made by check, and be payable to **The New York Bar Foundation.** Each donation should indicate that it is designated for the Phil Cowan Memorial/BMI Scholarship. All donations should be forwarded to **The New York Bar Foundation, One Elk Street, Albany, New York 12207, Attention: Kris O'Brien, Director of Finance.**

About BMI

BMI is an American performing rights organization that represents approximately 300,000 songwriters, composers and music publishers in all genres of music. The non-profit-making company, founded in 1940, collects license fees on behalf of those American creators it represents, as well as thousands of creators from around the world who chose BMI for representation in the United States. The license fees BMI collects for the "public performances" of its repertoire of approximately 4.5 million compositions—including radio airplay, broadcast and cable television carriage, Internet and live and recorded performances by all other users of music—are then distributed as royalties to the writers, composers and copyright holders it represents.

Library Hotel Settles with Owner of Dewey Decimal System

By Matthew David Brozik

In our previous issue, I wrote of the lawsuit brought by OCLC Online Computer Library Center, Inc. (OCLC) of Dublin, Ohio—owner of the Dewey Decimal Classification® system trademarks—against 299 Madison Avenue, L.L.C. d/b/a The Library Hotel of New York City. I had planned to follow that piece with a "Part Two," anticipating the filing of an answer in the United States District Court action. *Alas!* Counsel for the parties executed a stipulation of dismissal with prejudice, dated, accepted by United States District Judge Sargus, and filed all on November 24, 2003 (as the time for the defendant to answer the complaint had previously been extended on consent of counsel and with the court's permission to November 26, 2003). The stipulation of discontinuance avers that the parties to the action have entered into a settlement agreement.

In a press release also dated November 24, 2003,[1] OCLC announced that under the settlement terms:

> The Library Hotel will receive permission from OCLC to use the Dewey Decimal Classification® system trademarks in its hotel and in its marketing materials, with an acknowledgement that OCLC is the owner of the Dewey® trademarks. The Library Hotel will make a financial donation to a non-profit organization that promotes reading by children.[2]

OCLC's president and CEO is apparently pleased with the settlement, as is the owner of The Library Hotel, who suggested that acknowledging OCLC's ownership of the marks in question and giving money to charity was preferable to litigation.

Endnotes

1. Viewed at http://www.oclc.org/news/releases/20031124.htm.
2. *Id.*

Matthew David Brozik is a civil litigator in Great Neck. He enjoys writing nonfiction about copyright law and trademark law and humorous fiction.

Is Scènes à Faire Really "Necessary"?

By Jessie Beeber and Maura Wogan

We all know that classic scene in the hardboiled detective story where the blonde bombshell opens the office door (carefully stenciled with the P.I.'s name) and enters the dimly lit office (decorated with a potted plant, filing cabinets and wide-slatted Venetian blinds, of course). She plops herself down in the straight-backed chair and starts to tell her story. He offers her a drink from the bottle stored in his bottom desk drawer. He leans over to light her cigarette. Suddenly shots ring out, the bullets narrowly missing our hero's head. . . .

Okay, so maybe we are not the best fiction writers (we are only lawyers, after all) but we do have a point here—one that is actually related to copyright law. In the same way that a copyright owner cannot own an idea, but only his or her expression of that idea, no one owns stock or standard expression. Copyright law simply does not allow a monopoly (even for a limited period of time) over the hardboiled private eye with a bottle of whiskey in his desk drawer and his name stenciled on his door. In a nutshell, that is *scènes à faire*.

> *"Scènes à faire are those that the audience could not do without, and that if left out of the drama would cause major disappointment . . ."*

While the scènes à faire doctrine may sound simple enough in theory, how courts have applied it in practice is another matter entirely. Specifically, when examining the court-created construct that scènes à faire are elements "necessary" to the telling of a story, one quickly finds that the elements courts point to are not "necessary" at all. What is really happening is that courts are using the scènes à faire doctrine to take cases of clear non-infringement away from juries and to dismiss them at the earliest stage possible. This not only conserves judicial resources, it also avoids jury decisions that would be at odds with the copyright principle of leaving ideas and stock expression free for everyone to use.

What Is the Scènes à Faire Doctrine?

The phrase *scènes à faire* is French for "scenes that must be done." Originally, it was used by French drama critics to mean "obligatory scenes." Scènes à faire are those that the audience could not do without, and that if left out of the drama would cause major disappointment, like that scene at the end of a Shakespeare comedy where all the miscommunications are straightened out and everyone gets married.

The doctrine has evolved from an obscure tenet of dramatic criticism into a legal theory under which courts may hold that certain expression is not entitled to copyright protection. Specifically, courts understand scènes à faire to mean scenes that are "necessary" or "must" be included in a given context, scenes that are "standard" or "stock," or scenes that "flow naturally" from an unprotectable basic plotline.

> *"[C]ourts are using the scènes à faire doctrine to take cases of clear non-infringement away from juries and to dismiss them at the earliest stage possible."*

Why Are Scènes à Faire Not Protected by Copyright?

There are three basic rationales that explain why scènes à faire are not protected by copyright:

1) **They are merely "ideas."** Copyright protection reconciles two competing societal interests—rewarding individual creativity and allowing progress and improvement by others (not the original author) based on the same subject matter. The copyright law accomplishes this through what is called the "idea/expression dichotomy." Thus, while the expression of an idea is protected by copyright, the idea itself is not. The scènes à faire doctrine is an extension of this basic principle. In the same way that ideas must be free for all to use, there may be times when the most natural or logical way of *expressing* those ideas must be available to all as well. To forbid such use would narrow the options available to new authors and would be inconsistent with copyright's goal of promoting creativity.

2) **They are not "original."** Under copyright law, only original works of authorship are protected. While the standard for originality is low (basically only a modicum of creativity is required), the scènes à faire doctrine seems to recognize and incorporate the old axiom that there are no new stories, only new treatments.

3) **They were not copied.** Authors working independently on the same theme or from a common source may very well use the same scenes to move their stories along. Therefore, a third explanation as to why scènes à faire are not protected by copyright is that the similarity between two works may not be the result of copying. Where there is no copying, of course, there is no copyright infringement.

> *"Though the courts do decide to dismiss cases of coincidental similarities (perhaps to prevent confused juries from finding copyright infringement), they do not seem to actually be applying the standard they articulate."*

Scènes à Faire in the Courts

Courts have developed several different tests for determining what is or is not scènes à faire. While these tests permit courts to dismiss cases of clear non-infringement, they do not stand up well to close examination and, in practice, the courts have had a very difficult time articulating and applying them.

1) **"Necessary"** The most common test for scènes à faire is "scenes that necessarily result from the choice of setting or situation." This is similar to the original French idea of a scene that must be done.[1]

2) **"Stock scenes"** Scenes that are trite, clichéd, or stock in the treatment of a subject have also been deemed scènes à faire and not protectable.[2]

3) **"Flows naturally"** Finally, some courts define scènes à faire as elements that "flow naturally" from a setting or subject matter.[3]

But Is "Necessary" Really Necessary?

When you look at how some courts have actually applied the "necessary" test in practice, it becomes clear that while the ultimate result may be justified, the path taken to get there does not necessarily make sense. Though the courts do decide to dismiss cases of coincidental similarities (perhaps to prevent confused juries from finding copyright infringement), they do not seem to actually be applying the standard they articulate. Two examples:

The "Fort Apache" Case. In *Walker v. Time Life Films, Inc.*, the plaintiff claimed that the movie *Fort Apache, The Bronx*, starring Paul Newman, infringed the plaintiff's book *Fort Apache Bronx, NY*. Among other things, the plaintiff argued that "both the book and the film begin with the murder of a black and a white policeman with a handgun at close range; both depict cockfights, drunks, stripped cars, prostitutes and rats; both feature as central characters third- or fourth-generation Irish policemen who live in Queens and frequently drink; both show disgruntled, demoralized police officers and unsuccessful foot chases of fleeing criminals."[4]

We all might agree that these similarities were coincidental, or attributable to the fact that both stories share the same setting of a much-maligned Bronx police precinct. What the court held, however, was that the disputed scenes involving drunks, prostitutes, vermin and derelict cars were "scenes that *necessarily* result from the choice of setting or situation."[5] Of course, however, the court did not explain why these particular elements were necessary to that setting. It at least seems possible to tell a story about police in a Bronx precinct without resorting to scenes of derelict cars, vermin and the like.

The court also added another gloss. It said that copyright does not protect "stock" themes commonly linked to a particular genre, and cited as examples: "[F]oot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop." The court characterized these as "venerable and often-recurring themes of police fiction." Interestingly however, the court did not call these elements scènes à faire.

The Survivor Case. *CBS Broadcasting, Inc. v. ABC, Inc.* also illustrates the difficulty in rationally applying the "necessary" test. The question in that case was whether the format of the reality TV show "I'm a Celebrity: Get Me Out of Here" infringed "Survivor," another reality show. The plaintiff pointed out that both shows were set in remote locations (specifically Australia); that in both shows contestants were "voted off" and that the shows had similar hosts. The plaintiff also offered a tape montage showing, among other things, a scene where contestants on both shows eat worms.

The court denied the plaintiff's motion for a preliminary injunction, concluding that the alleged similarities were only as to unprotectable elements. The court concluded that "in a remote, hostile environment, or deserted island set-up, eating unattractive, crawling creatures is part of the scènes à faire." Again, while we might agree with the result, it is harder to stomach (thankfully only figuratively) the court's application of the "necessary" test. Something as specific as eating worms does not seem to necessarily result from the setting of a reality show in a remote location. As anyone who watches "Fear Factor" can tell you, there are at least two dozen other repulsive things the contestants could have eaten.[6]

Conclusion

If there is any generalization to be made here, it is that courts use the scènes à faire doctrine to dispose of obvious noninfringement cases, particularly involving claims by plaintiffs that their (often obscure or unknown) stories or screenplays were ripped off to create famous dramatic properties, like blockbuster movies and popular television shows. Perhaps, at bottom, the courts are influenced by the economic realities of the situation—can the success of a costly and fully developed motion picture, replete with megastars and special effects, really be explained by the use of an unknown story or screenplay? The courts seem to recognize that if one motion picture is found to infringe because it tells a familiar story, then other films will be subject to similar claims, and the copyright goal of promoting the creative process would be thwarted.

It also could be that courts, mindful of the tension between protecting authors' works and promoting creativity, use scènes à faire as a way of taking these cases away from the jury. Rather than leaving it to a group of ordinary citizens to separate the protectable wheat from the unprotectable chaff (something that the courts themselves find difficult to do on a good day), they use the doctrine of scènes à faire to justify appropriate dismissals.

Endnotes

1. *See, e.g., Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942); *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986); *CBS Broadcasting, Inc. v. ABC, Inc.*, No. 02 Civ. 8813 (LAP) (S.D.N.Y. Jan. 13, 2003).
2. *See, e.g., Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978).
3. *See, e.g., Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002).
4. *Walker*, 784 F.2d at 50.
5. *Id.* (emphasis added).
6. See also *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996), where the court held that electrified fences, automated tours, dinosaur nurseries, uniformed workers and "placing dinosaurs on a prehistoric island far from the mainland" were "classic" scènes à faire for a dinosaur adventure story.

"The courts seem to recognize that if one motion picture is found to infringe because it tells a familiar story, then other films will be subject to similar claims, and the copyright goal of promoting the creative process would be thwarted."

Jessie Beeber and Maura Wogan are partners at Frankfurt Kurnit Klein & Selz, P.C., where they concentrate in entertainment, advertising, copyright and trademark litigation. This article was adapted from a program they presented to The Copyright Society of the U.S.A., New York Chapter, on January 15, 2004.

Tort Liability in Sports Products Liability

By Tara Di Luca

Sporting events in America have always provided an escape from the realities of the stressful hustle and bustle of living in a technologically advanced, commercialistic society. Whether involving participants or spectators, amateurs or professionals, sports provides the inevitable backdrop for the average American's weekend leisure activities. However, behind the scenes, behind the football masks, soccer balls, hockey pucks and flashy uniforms, sports give way to a mass of litigation.

Like any performance, preparation for a sporting event requires cooperation from a number of different people to secure the premises from disruption to ensure that the event runs smoothly and is enjoyable. These people include coaches, facility operators and even the athletes themselves. Yet what about the darker side of sports, such as incidents arising from the use of defective equipment and inadequate warnings on sporting gear and products? What happens when an athlete is seriously injured, or even killed? Who is to blame?

This article addresses such serious questions. It will briefly introduce the background of products liability law and will then explore the evolution of products liability law in sports, particularly how the law applies to specific sports injuries, including manufacturer and coaches' liability. This article will also cover defenses and the related issue of spectator injury, in addition to an exploration of the possibility for reform in products liability law generally and in that specific area. Finally, it will conclude that although manufacturers are continuously creating innovative design techniques for their products, there is no guarantee that any product is necessarily "safer" and will prevent all injuries from occurring.

Background

The most common claims brought in products liability suits include manufacture defect, design defect and failure to give adequate warnings or instructions.[1] A consumer bringing a products liability suit has the burden of proving that 1) the defendant manufactured the product, 2) the product was defective, 3) the product caused the injury and 4) the product defect existed when the consumer bought it.[2]

Products liability law is relatively new, and has defined a number of different theories over the years. Products liability is generally considered a strict liability offense. Therefore, the degree of carefulness exercised by the defendant is irrelevant; if there is a defect in the product that causes harm, the defendant will be held liable for it. In its 1963 decision in *Greenman v. Yuba Power Products*, the California Supreme Court announced this remedy of tort liability that did not require the necessity of proving negligence.[3] This new strict liability in tort found a manufacturer strictly liable when the article that it placed into the market proved to have a defect that caused injury to a human.[4] In *Greenman*, the plaintiff was seriously injured when a piece of wood he was working on suddenly flew out of the Yuba power tool he was using and struck him in the forehead. Based on expert witnesses' testimony, the court concluded that the defective design and construction of the Shopsmith power tool caused the wood to fly out from the machine. To establish the manufacturer's liability, the court found that it was sufficient that the plaintiff proved that he was injured while using the Shopsmith power tool in a way it was intended to be used, and was injured as a result of the defect in design and manufacture.[5]

In 1965, as a result of the *Greenman* decision, the authors of the *Restatement (Second) of Torts* published section 402A, proposing strict liability in tort for any person who sells a product in a defective condition unreasonably dangerous to the user or consumer or his property. This amendment suggested a consumer expectations standard for what represents an unreasonably dangerous condition. Courts will usually determine whether a product is unreasonably dangerous by reference to whether the article sold was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.[6] While products liability law varies from state to state, the *Restatement (Second)*, and most recently the *Restatement (Third)* provide persuasive authority and guidance for courts to follow. The most prominent products liability amendment is published in section 2(b) of the new *Restatement (Third)*. This section requires a plaintiff in a products liability case to provide evidence of a reasonable alternative design to prove a design defect.[7] Although tort law varies from state to state, the authors of the *Restatement* assert that this rule represents the law in the majority of American jurisdictions. However, many courts disagree, and continue to follow the *Restatement (Second) of Torts*.[8]

Liability for Sports Injuries

Manufacturers

Products liability claims may be based on negligence, strict liability or breach of warranty of fitness.

The most common products liability claims in sports litigation suits are based on strict liability and negligence. Strict liability arises when the product becomes unreasonably dangerous by virtue of a defect. Negligence claims occur when there are defects in design, manufacture or warning labels. One may prove fault by showing a breach of a duty, poor workmanship or a history of problems with a particular product. Perhaps the most common subject matter of product liability in sports-related cases concerns product defects and failure to warn.

One area of extensive litigation that has defined products liability law in sports involves protective helmets. These cases involve situations in which helmets failed to prevent particular injuries and in which the helmets themselves were alleged to have caused a particular injury. For example, in 1992, Dennis Byrd of the New York Jets broke his neck after running headfirst into the chest of teammate Scott Mersereau. The collision resulted in paralysis from the waist down.[9] This incident was deemed a freak accident, and no investigation was commenced to determine whether Byrd's helmet was a contributing factor. It seemed apparent that the paralysis occurred as a result of the position of his body when he collided headfirst into his teammate. As catastrophic injuries are not uncommon among both professional and amateur athletes, players and manufacturers of helmets continue to find themselves engaged in lengthy and expensive lawsuits.

A prominent case in this area of product liability concerned a Texas high school football player, Jose Rodriguez. In *Rodriguez v. Riddell Sports Inc.*, the Texas Court of Appeals held Riddell Sports Inc. strictly liable for a design defect in the helmet and ordered it to pay $14.62 million in damages to Rodriguez to compensate for a severe brain injury suffered by Rodriguez during a high school scrimmage.[10] Rodriguez's injury caused permanent brain injury and put him in a vegetative state. The court evaluated the defect in light of the economic and scientific feasibility of safer alternatives. It found that a safer helmet design had been readily available to the manufacturer prior to the injury's occurrence.

A similar case involved another Texas high school football player, Mark Daniels. In *Rawlings Sporting Goods Co. v. Daniels*, the Texas Court of Appeals held that the manufacturer had a duty to warn users that its helmet would not provide protection against head and brain injuries.[11] The failure to do so led to a strict liability claim, as the failure to warn rendered the piece of equipment unreasonably dangerous for the user.

In *Daniels,* a high school football player suffered severe and permanent brain damage when he collided with a teammate. The force of the impact produced an indentation in Daniels' helmet. Daniels' mother sued the manufacturer, claiming that the helmet was defectively made. The court agreed and found that the helmet was a "producing cause of player's injuries."[12] The court further stipulated that the manufacturer's failure to warn that its helmet would not protect against subdural hematomas exposed the player to an unreasonable risk of harm, and was the proximate and negligent cause of his injury.[13] The court reasoned that the primary purpose of a football helmet is to protect the wearer against "head" or "brain" injuries.[14] Rawlings Sporting Goods Co. had known for some time that its helmets did not protect against brain injuries and subdural hematomas; that almost all fatal football injuries result from head and neck injuries and that when a person uses a football helmet for its intended purpose of protecting the head while playing football, there is still a significant risk of brain injury.[15] In spite of this knowledge, the defendant made a conscious decision not to warn users that the helmet would not protect the brain from this type of injury. As a result, Daniels was awarded $1.5 million.

Daniels became a landmark case, as it prompted helmet manufacturers to develop adequate warning labels. As a result of this case, every football helmet now includes the following warning:

> WARNING: DO NOT STRIKE AN OPPONENT WITH ANY PART OF THIS HELMET OR FACE MASK. THIS IS A VIOLATION OF FOOTBALL RULES AND MAY CAUSE YOU TO SUFFER SEVERE BRAIN OR NECK INJURY, INCLUDING PARALYSIS OR DEATH. SEVERE BRAIN OR NECK INJURY MAY ALSO OCCUR ACCIDENTALLY WHILE PLAYING FOOTBALL. NO HELMET CAN PREVENT ALL SUCH INJURIES. YOU USE THIS HELMET AT YOU OWN RISK.[16]

Since this warning first appeared, there has been a marked decline in successful lawsuits against helmet manufacturers. However, there are still a few loopholes. Manufacturers will still be held liable if a helmet is found to be defective despite an adequate warning label, and if that defect is not "open and obvious."[17]

Yet even with the loopholes, defendant manufacturers can prevail. For instance, four years after *Daniels*, the court in *Lister v. Bill Kelley Athletic, Inc.*, held that the inherent danger of a football helmet was not a proper basis in which to hold the manufacturer strictly liable for a spinal injury.[18] The manufacturer did not have any duty to warn because the helmet was not defectively designed or constructed, and the possibility of injury resulted from a common propensity of the helmet, which was "open and obvious."[19] In *Lister,* the plaintiff consumer, a high school football player, appealed a judgment of the lower court, which ruled in favor of defendant helmet manufacturer. The plaintiff's sole contention on appeal was that the manufacturer's liability for failure to warn was established as a matter of law. He maintained that the football helmet in question was defective because it failed to warn that it could not protect against injuries to the cervical spine, which might result in quadriplegia or death.[20] The court in *Lister* reasoned that the helmet was not defective and did not cause the injuries suffered.[21] The consumer knew he could get hurt playing football, so the failure to warn against spinal injuries was not negligent. The analysis applied by the court in that case appeared to shift some of the liability to the consumer athlete. The court in *Lister* discussed the plaintiff's knowledge of potential injury evidenced by the fact that he was taught to tackle his opponents with his head up, as to avoid serious or fatal injury to the head, neck, and spine.[22]

What exactly did the court in *Lister* mean by "open and obvious?" It seems that the court relied on common sense, logic and experience. The test applied reflected what the reasonable person would conclude.[23] Similarly, in *Berkner v. Bell Helmets, Inc*., the court held that any reasonable person could draw the conclusion that a black bicycle helmet did not warn drivers of an approaching bicyclist, and it was "open and obvious" that the helmet was not a lighter color and that it did not have reflective material.[24] In *Berkner*, the plaintiff sued a bicycle helmet manufacturer, claiming that its black colored helmet was defective because it lacked conspicuity. In addition, the plaintiff claimed that the helmet manufacturer negligently designed the helmet, was strictly liable for the defective helmet, and had failed to warn customers of the helmet's lack of conspicuity. The court held that the lack of conspicuity was an obvious and patent danger and thus the helmet manufacturer did not have a duty to warn of the open and obvious dangers or characteristics. Therefore, the helmet was not found to be defective. The lack of a safety feature and conspicuity was observable from a simple visual inspection. Any reasonable person could draw the conclusion that a black bicycle helmet does not warn drivers of an approaching bicyclist.[25]

While *Daniels* sets the standard for strict adherence to adequate warnings, *Lister* advocates at least some responsibility to the consumer athlete. This reasoning can most likely be resolved by analyzing the football helmet as a piece of "protective equipment." The helmet is designed with features to protect the face, head and brain from serious or fatal injury, but is not designed to protect the neck and spinal area. It seems logical, then, that a manufacturer is not liable for failure to adequately warn against an injury which its product was never designed to prevent and that it never alleged to prevent. The court in *Lister* rejected the idea of expanding strict liability to cases involving neck and spinal injury, absent any defect in the helmet itself. If the helmet provides adequate warnings, as established in *Daniels*, the court will most likely find an absence of negligence or defect on the part of the manufacturer. It would not be feasible to conclude that consumer expectation encompasses the guarantee that football helmets will prevent neck and spinal injuries. On the other hand, consumers can expect that the helmet will provide adequate protection against face, head and brain injuries if used in an appropriate fashion.

A recent case of interest involves an alleged defect of a particular brand of hockey helmets and facemasks. In *Mohney v. USA Hockey*, the court permitted evidence showing that the helmet Mohney was wearing at the time of the accident contained a warning in three places: 1) On the helmet itself, 2) on a hang-tag attached to the helmet and 3) on the box containing the helmet, stating:

> ICE HOCKEY IS A COLLISION SPORT WHICH IS DANGEROUS. THIS HELMET AFFORDS NO PROTECTION FOR NECK OR SPINAL INJURY. SEVERE HEAD, BRAIN OR SPINAL INJURIES, INCLUDING PARALYSIS OR DEATH, MAY OCCUR DESPITE USING THIS HELMET. DO NOT USE THIS HELMET IF THE SHELL IS CRACKED OR IF THE INTERIOR PADDING IS DETERIORATED. READ INSTRUCTIONS CAREFULLY BEFORE WEARING.[26]

The court found that the plaintiff knew of the risks involved in playing hockey, and that the helmet was not designed to protect against spinal or neck injuries. Manufacturers cannot be held liable based on the failure of their products to do something they were not designed to do.[27] The district court observed, "it appears to be undisputed that there is no viable way to design a face mask and/or helmet to provide protection against spinal injuries while permitting hockey players sufficient freedom of movement to play the game effectively."[28] However, on appeal, the court found that Mohney never had a fair chance to establish a genuine issue of material fact as to the product liability claims. Since the court independently adjudicated the plaintiff's product liability claims without giving him a proper opportunity to discover and present evidence on these claims, the case was remanded. The Court of Appeals determination was certainly a logical and sound result, consistent with the goals of product liability claims. The plaintiff in *Mohney* was not given the adequate opportunity to present his claim and "have his day in court."

In *Peisino v. Riddell, Inc.,* the plaintiff, a high school quarterback, was injured when he tripped and the top of his helmet collided with an opposing player's thigh.[29] The plaintiff claimed that the helmet was defectively and negligently designed because the padding in the helmet's lining had been insufficient to reduce the force to a noninjurious level.[30] Riddell, Inc. claimed that the plaintiff used an incorrect playing technique, and therefore contributed to his own injury.

The plaintiff presented evidence of helmet testing by the National Operating Committee on Standards for Athletic Equipment, or NOCSAE, which demonstrated that the helmet worn by Peisino scored last of all helmets subjected to safety testing in protecting against impacts to the top of the helmet. The plaintiff presented additional standards, which showed that his football helmet did not pass tests that other football helmet models passed. Finally, he used self-devised tests to show the force of impact on the neck and shock reduction characteristics with different helmet padding designs. This evidence, coupled with the defendant's in-house records of testing, which indicated that it only conducted preliminary investigations regarding the correlation between helmet design and neck injury, supported the plaintiff's theory that his injury occurred from shock transmitted through the helmet to his spine.[31]

The jury awarded the plaintiff $ 3.5 million, finding that a reasonably safe helmet would have sufficiently reduced the force level to the spinal cord below the threshold necessary to prevent injury. The court in *Peisino* relied heavily on the testing results presented by the NOCSAE.[32]

Football helmet manufacturers have regularly been held liable for accidents on the playing field. Frequent and costly lawsuits have driven insurance rates skyward, and helmet manufacturers out of business.[33] Currently, Riddell Adams USA and Schutt remain the major football helmet manufacturers. Riddell Adams USA is the official licensed manufacturer of the NFL and most college football teams. That company has been the most innovative in its mission to improve product safety more effectively and efficiently than any other manufacturer.[34] Representatives of Riddell Adams USA and Schutt recently appeared before a Senate subcommittee to argue that restricting the rights of injured victims to sue is necessary to counter the skyrocketing cost of insurance premiums and other expenditures associated with lawsuits. Further, they argued that a severe restriction on the rights of consumers to sue manufacturers of defective products was necessary.[35]

Due to the technologically advanced age of American industry, many manufacturers offer a "state-of-the-art" defense when faced with products liability suits. "State of the art" refers to the existing level of technological expertise and scientific knowledge relevant to the particular industry at the time when a product is designed. This analysis determines whether there was the availability of a reasonable alternative design at the time when the product was manufactured, the omission of which renders the product not reasonably safe.[36] In *Eldridge v. Riddell*, the court found that the manufacturer Riddell had not acted negligently when it failed to market an accessory chin roll to a football helmet.[37] The plaintiff's son died from neck injuries suffered as a result of a collision with an opponent during a football game. The plaintiff based his claim on strict liability product defect, and argued that the chin roll, if used, would have prevented the type of injury suffered by the decedent. The plaintiff asserted that by adding a chin roll device to the chinstrap, the neck area, not the head, could be protected from severe injury.

However, the court found that the helmet in question was not defective in design when it was manufactured and sold in 1980, and was not defective at the time of the accident in 1986.[38] The chin roll device was not patented until 1982, and was not manufactured by any helmet company at that time. Further, helmet manufacturers did not market the roll until Rawlings added it to its 1987 catalogue, one year after the accident in this case. Therefore, the manufacturer was not liable for failure to include a chin roll device with its helmets. Further, there was absolutely no evidence tending to prove that the chin roll was a widely adopted safety device.[39] On the contrary, the idea of a chin roll never gained acceptance in the sports industry as a safety device.

On the other hand, there have been cases where the plaintiffs proffered evidence that there were more effective, alternative designs available and that the manufacturers knew of those alternatives. In *Braverman*, the plaintiff was thrown from his bicycle during a cycling race and suffered injuries to his head.[40] He brought an action against the manufacturer, Kucharik Bicycle Clothing Co., alleging that he was wearing its leather safety helmet at the time of the accident. The plaintiff alleged that the helmet was defectively designed, in that it did not provide adequate protection when being worn in an ordinary and usual manner. Experts testified that the defendant manufacturer's polyester-filled leather hairnet helmet did not meet industry standards for protective headgear. One particular expert reached this conclusion by studying the helmet's design and specifications.[41] Further, the manufacturer represented and promoted its leather helmets as "providing superior protection when compared to hard shell plastic helmets," which the court interpreted as proof that the manufacturer was aware of an existing alternative design.[42]

Manufacturers have also been held liable for breach of an express warranty. An express warranty is made when the seller or manufacturer makes a material representation as to a product's composition, durability, performance or safety.[43] This sort of a warranty can be made by way of spoken comment or advertisements. In *Yarusso v. International Sport Marketing*, the plaintiff became a quadriplegic following an accident on his off-road motorcycle.[44] The plaintiff's express warranty claim against the manufacturer was based on the promise that the non-resilient inner liner of its helmet would crush in the event that there was a blow to the helmet, thereby reducing the wearer's injury to the head. The plaintiff offered evidence showing that the helmet he was wearing did not crush during his accident, and as a result he was awarded damages.[45]

In a more severe case, a child was left brain-dead after he was struck in the head with a golf ball when his "Golfing Gizmo" toy malfunctioned.[46] The packaging of the Golfing Gizmo displayed the message: "Completely Safe—Ball Will Not Hit Player." The Supreme Court of California held that the words on the box were more than just decorative "sales talk," and that the language itself amounted to an express warranty.[47]

What can consumers do to protect themselves from unexpected accidents? To help consumers become aware of defective products, the United States government created the Consumer Product Safety Commission (CPSC).[48] Numerous publications, press releases and product safety alerts are available 24 hours a day. Consumers are notified of recent recalls of defective or dangerous products, and can even call a free 24-hour hotline with questions. Companies that find a defect or dangerous characteristic in their products may voluntarily recall the product. This can save consumers from further serious injury and save manufacturers from further liability and harm to reputation. For example, consumers became alerted when Bell Sports Inc. of San Jose, California, recalled about 5,800 bicycle helmets used for BMX, downhill mountain biking and racing. A defect with the helmet chinstrap rivets was causing it to come off the rider's head in the event of a fall or crash.

Further, National Sporting Goods Corp. of Passaic, New Jersey, voluntarily recalled about 3,600 men's and women's 100 Series Bullet speed skates. Consumers were cautioned that the wheel and axle assemble may break off during skating, resulting in injury to the skater. K2 Corp. of Vashon, Washington, also recalled about 12,000 "FLIGHT ALX" brand in-line skates. The skate's plastic brake mount tended to crack and fail, causing the skater to fall and suffer serious injury.

King Athletic Goods of Fairfield, New Jersey, in cooperation with the CPSC, offered an update kit to repair a possible defect on the "King Sport" aluminum bat. Commission reports indicated that the rubber grips on these aluminum baseball bats became loose, worn, torn or otherwise damaged.[49] According to Commission staff, this created a risk of injury, because a bat while in use may separate from a deteriorated grip, be propelled through the air and strike a person. To prevent this, King Athletic offered the update kit free of charge.

In cooperation with the CPSC, Rawlings Sporting Goods Co. Inc. of St. Louis, Missouri, voluntarily recalled about 45,000 slow-pitch softball bats. The tops of the bats tended to shear off during use, posing an injury hazard to batters and bystanders.

Also in cooperation with the CPSC, Huffy Sports Co., of Sussex, Wisconsin, recalled about 70,000 portable basketball systems. The basketball hoops had a sharp protruding bolt on the players' side of the pole that could cause serious leg or body lacerations to consumers. Basketball players might be cut when they collided with the poles as they drove toward the baskets or when they fell or were pushed into the poles. CPSC and Huffy Sports received 11 reports of injuries from protruding bolts that included scrapes and lacerations.

Further, in cooperation with the CPSC, Irwin Sports of Toronto, Ontario, announced the recall of about 8,400 faceguards for baseball catchers' combination faceguard helmets. Adjusting the wire faceguard too low on the helmet allowed a ball to pass through it, leading to serious injuries to the face or head.

In March 2003, MOSA Sports of Hermosa Beach, California, voluntarily recalled about 1,250 bicycle helmets. The helmets failed impact testing required under the CPSC's Safety Standard for Bicycle Helmets, violating the Consumer Product Safety Act. Riders wearing these helmets were not adequately protected from falls and could suffer head injuries.[50]

Most recently, on April 17, 2003, in cooperation with the CPSC, Dynacraft Industries of San Rafael, California, voluntarily recalled about 52,900 BMX bicycles. The stems on these bicycles were prone to loosen during use, causing riders to lose control and fall.[51] As evidenced, the CPSC provides an informational forum where consumers can investigate a certain product, receive 24-hour guidance and educate themselves on proper safety techniques.

Coaches

Liability for sports injuries is not limited to product manufacturers. Coaches have been held liable for injuries to athletes as well. In 1982, a landmark case awarded a high school football player $6.4 million for an injury that left him a quadriplegic.[52] The injury occurred during practice, when the player lowered his head while being tackled. The coach was sued for failure to warn the athlete of the dangers inherent in the sport and for improper coaching instruction. This case was important because it shifted a great deal of responsibility for the inherent risks involved in sports from the participant athlete to the coaches.[53]

Coaches may have one of the most important functions in maintaining a safe environment for their athletes. Coaches must use reasonable care to avoid the creation of foreseeable risks to the athletes under their supervision.[54]

Coaches have a number of duties that, when breached, can lead to liability. First and foremost, they have a duty to take all reasonable steps necessary to minimize the possibility of injury. This duty can be fulfilled by instructing and helping the athletes to understand safety procedures and methods to minimize injury; by providing safe and effective protective equipment; and by making sure the athletes are in proper physical condition. A coach can be held liable if he fails to provide sufficient training, conditioning, equipment and supervision.[55]

In *Woodson v. Irvington School Board of Education*, a track athlete was recruited for football and severely injured while tackling an opposing player on an interception. He had only practiced one session on tackling. The court held that tackling is an extremely dangerous aspect of the sport, and that the correct technique and manner, including keeping the head up, must be reinforced by repeated practice. The plaintiff was also not provided with sufficient pre-season training, including weight training to strengthen neck muscles, which was essential to minimize injury to the neck and spine.[56] The absence of proper instruction and physical training contributed to the plaintiff's catastrophic injuries.

In *Everett v. Bucky Warren, Inc.*, a hockey coach was found negligent in supplying his team with a certain type of three-piece helmet, when he should have known that an alternate helmet with a safer single-piece design was readily available at that time.[57] The single-piece feature was in fact known to the coach at the time of the accident, but was sold at a slightly higher price than the three-piece helmet. The court held that the experienced hockey coach should have known that the three-piece design was faulty and that another more safely designed helmet was available. The court appeared to apply more of a subjective standard, taking into account that particular coach's high level of experience. As a result, the coach was held to a higher standard than the average person.

However, coaches' negligence will not relieve the manufacturer from liability where the product is found to be defective. If so found, courts will apply comparative fault liability.[58]

Although a coach's liability does not get the manufacturer off the hook if a piece of athletic equipment is in fact defective, manufacturers can still defend against a products liability claim by asserting that the product was misused or that the athlete was not instructed properly. In such a case, a coach may be held jointly liable.[59]

Defenses

Introduction to Defenses

Assumption of the risk is defined as a voluntary assumption, expressed or implied, of a known risk.[60] While athletes do not assume the risk of dangerously defective equipment, there are some risks inherent in sports that are so obvious that the courts will consider them assumed by all players. For example, in the sport of football, body contacts, bruises and clashes are inherent to the game. No prospective player needs to be told that a participant in the game of football may sustain injury. That fact is self-evident.

In *Passantino v. Board of Education of the City of New York*, a high school baseball player suffered a paralyzing accident when he slid headfirst into home plate, using his head as a battering ram in order to run over the catcher.[61] The plaintiff was permanently paralyzed and became a quadriplegic as a result of the collision. He filed suit, claiming negligence against the New York City Board of Education and his baseball coach. The lower court awarded him $1.8 million in damages for his tragic injury. However, in a controversial opinion, the Court of Appeals reversed on the ground that the player had participated voluntarily in the sport and should have known the risks associated with sliding headfirst.

This case is unsettling, since the court's holding focused on the voluntary participation in the sport rather than the coach's failure to warn his player of the dangers associated with sliding headfirst. In fact, the coach actually praised his player for sliding similarly in another game. If the court had determined that the coach's failure to warn his athlete constituted a breach of his duty as a coach, then they probably would have found that such a breach was the proximate cause of injury to the player. However, courts weakened the assumption of the risk doctrine six years after *Passantino* in *Thompson*, which was discussed earlier.[62] A defendant can defend against a plaintiff's strict liability claim by showing the plaintiff's assumption of the risk. This defense requires a high showing, consisting of the plaintiff's actual subjective knowledge of the hazard and subsequent voluntary encounter with that hazard.

In *Vendrell v. School District No. 26C, Malheur County*, the plaintiff was injured in a high school football game and sued the school district for negligence, claiming improper and insufficient instruction.[63] Until he amended his complaint three times, the plaintiff had failed to allege that he had played with defective equipment. The court held that he had assumed the risk, reasoning that if the equipment were unsuitable in any way to the plaintiff's needs, he would have been intimately familiar with the defect, but still proceeded to play.[64] Therefore, the plaintiff's injury was the proximate cause of his awareness of the risk and his subsequent voluntary participation.[65]

Contributory Negligence

The theory of contributory negligence consists of conduct that falls below the standard a plaintiff should meet for his own protection, and which is the contributing cause of his injuries.[66] A manufacturer cannot defend against a plaintiff's claim of strict liability on this theory, as the athlete does not have an affirmative duty to discover a defect in a product, or to guard against the possibility of its existence. However, a plaintiff's conduct may be relevant in a negligence-based strict liability suit, for example where the athlete did not pay attention to coaches' instructions. In sum, a plaintiff will not recover for negligently inflicted injuries if she proximately contributed to her own injury.

In a case concerning a health spa slip and fall, a spa member who allegedly slipped and fell on a foreign substance in the shower was found to be contributorily negligent where she had used the spa facilities on several occasions and was aware that the showers were slippery, filthy and dirty.[67] The court found that she exposed herself to the risk without considering the condition of the showers on that day. Other examples of contributory negligence might include injuries arising from roughhousing in the locker room.

Comparative Fault

Under comparative fault, the trier of fact compares the proportionate fault of the defendant to that of the plaintiff. Most states, including New York, have replaced contributory negligence and assumption of risk with comparative fault.[68] Under this theory, the plaintiff will be allowed to recover at least a proportion of the damages sustained if his negligence was proportionally less than the defendant's negligence. However, assumption of the risk is not necessarily merged into the defense of contributory negligence under principles of comparative negligence. For example, an experienced skater who intentionally and voluntarily chose to perform an unsupervised traverse on a ramp while holding a ski pole in each hand had assumed the risk of injury.[69]

A high school football player brought an action against the manufacturer of a football helmet to recover for injuries sustained in a high school football game.[70] The plaintiff attempted to tackle an opposing ball carrier who was running for a touchdown. The two players collided and the ball carrier somersaulted into the end zone and scored a touchdown. The plaintiff, his tackle attempt unsuccessful, lay motionless on the ground, suffering from a spinal cord injury that rendered him permanently a quadriplegic. The state's comparative negligence statute reduced the damages awarded in proportion to the amount of negligence attributable to the plaintiff. With respect to the negligence count, the jury found that "of all the negligence which proximately caused plaintiff's injuries, 40 percent was attributable to plaintiff and 60 percent was attributable to defendant."[71]

Situation Analysis

In some situations it is difficult to determine who, if anyone, is responsible for an athlete's injury. Do accidents really exist? Is human action or inaction determinative? These questions presented themselves in a recent tragic incident involving a Pennsylvania State University pole-vaulter. Kevin Dare died when he attempted to clear the crossbar, but instead tumbled backward from approximately a 15-foot height and landed head first into the 8-inch-deep exposed solid steel vaulting pit, crushing his skull. Pole-vaulting is a complex event with many different products involved, any of which if designed defectively, can result in tragedy. There is the actual pole, which is usually comprised of fiberglass. There is a crossbar and a vaulting pit, usually made of either steel or fiberglass. In addition, there is padding provided around the pit consisting of a certain width, length, depth and composition. Dare was a 19-year-old experienced pole-vaulter, having won the U.S. Junior Track and Field National Championships in the event the preceding year. He was also an All-American top ten collegiate pole-vaulter.[72]

This tragic incident raised a series of issues. Did the athletic equipment contain a design defect? Did the equipment contain adequate warning labels? Did the facility operators of the vaulting pit take precautionary measures to minimize harm by expanding the padded areas around the pit? If product liability claims were brought against the manufacturer of the pit, the court would have to determine whether there was a design defect, whether there was awareness and actual use of a safer design in the industry and whether there was a mechanical feasibility of a safer design. If an action were brought against the manufacturer of the pole itself, the court would look to the adequacy of the warning. In this specific situation, the following warning label was affixed on the pole:

> VAULTING IS A DANGEROUS ACTIVITY. SEVERE INJURY, PARALYSIS AND DEATH MAY OCCUR.

This incident also raised the issue of a coach's liability and breach of duty. Coaches must use reasonable care to avoid the foreseeable risks to athletes under their supervision. Dare was using a 16-foot pole, which was a foot longer than the pole that he was used to. While coaches have a duty to instruct their athletes regarding safety procedures and methods to minimize injuries, should this duty extend to minimizing the possibility of injury by preventing an athlete from using an unfamiliar pole? Or in the alternative, did Dare simply assume the risk by voluntarily engaging in this activity knowing of the inherent risks involved? Dare's father has become an advocate for safer industry vaulting equipment.

Some athletic equipment does not contain warnings. As a competitive hurdler, I have noticed that hurdles used in track and field competition do not contain any warning label affixed on the exterior of the hurdle. However, hurdling can become a dangerous activity when the hurdle is misused. Two examples of misuse include jumping the hurdle when it is backward or when it is set at an incorrect height. Hurdles are set at a different height for high school, college, men and women. The potential for danger seems obvious, and therefore warning labels are probably unnecessary. In my personal experience, competitive hurdlers have relied on their coaches for instruction and guidance.

When a severe injury occurs at any sporting event, the standards for safety are re-evaluated and in some instances are increased. Dare's tragic death lead to the crusade for increased safety measures in that particular event. Starting in 2003, the overall size of the pole-vault landing pad was increased in width, dimension and depth, thereby creating the new industry standard. In an attempt to help minimize risk, the placement of the landing pad immediately behind the planting pit was repositioned to reduce hard surfaces between the planting pit and the landing pad.

Spectator Injury

This section will focus on spectator injury, assumption of risk and facility liability. Some of the incidents that will be discussed did not result in lawsuits, thereby leaving much open to analysis and interpretation. The particular incident that prompted this research involved the death of 13-year-old Brittanie Cecil, who died as a result of being struck in the head with a hockey puck at a professional hockey game involving the Columbus (Ohio) Blue Jackets.[73] There were many questions surrounding this tragedy. Did Brittanie, as a spectator, assume the risk of being struck in the head with a puck? Or were the facility operators liable for failing to provide reasonably safe conditions for spectators, thereby breaching their duty of care?

Under the assumption of risk doctrine, spectators will usually not recover for injuries resulting from the ordinary, common and foreseeable risks so inherent in the sporting activity that they are attending, provided that the owner of the facility has exercised reasonable care to protect spectators from harm.[74] These risks can include getting hit with a foul ball at a baseball game or a puck at a hockey game. As a matter of law, the mere fact that a spectator attends a baseball game or hockey game signifies that she impliedly assumes those risks. A 1953 case provided precedent for this reasoning. In *Schentzel v. Philadelphia National League Club*, a female spectator was hit by a foul ball at a baseball game.[75] While this was her first visit to the park, she had watched television broadcasts and had viewed foul balls being hit into the grandstands. The court found that stray balls were a matter of common everyday practical knowledge, and as a matter of law, the spectator had impliedly assumed the normal and ordinary risk inherent to attendance at a baseball game.[76]

Baseball clubs have taken measures to actually warn fans of the risk of sitting in unprotected areas, specifically those seats behind home plate, nearest the dugout and down the first and third base lines. These fans are considered in the "assumption of the risk zone" and most likely will have no recourse if they are hit by a ball or bat during the course of play.

Spectator injuries have also been a major concern for NASCAR since Bobby Allison's 1987 crash in Talladega, Alabama.[77] During the event, Allison blew a tire and his car became airborne. A woman lost an eye after being hit by debris from Allison's car after it flew into the air and tore down nearly 100 feet of fencing. Although there have been no spectator deaths in NASCAR events, major changes have occurred as a result of this tragedy. NASCAR now mandates the use of restrictor plates to reduce the air intake through the carburetor, thereby reducing the flow of fuel into the engine and reducing the average speed of the car to about 193 miles per hour. Without restrictor plates, the cars are capable of going at an average speed of 230 miles per hour.[78]

Courts often take into account the capability of a minor to assume the risk. The minor must know and understand the risk that she incurs and the choice to incur this risk must be voluntary. If the Cecil matter had proceeded to court, the trier of fact would have taken into account the fact that Brittanie was an avid hockey fan. Although this was her first trip to a live NHL game, she frequently watched hockey games on television. It would be difficult to show that she was not aware that a puck might hit a spectator, and therefore difficult to assert the "ignorance of the basic play of the game" defense.

A facility operator owes spectators a reasonable duty of care to keep them out of harm's way.[79] Courts still apply an objective standard of negligence, but specific knowledge of the risks of the game gives rise to a duty to exercise reasonable care. Operators are business inviters and will be liable for conditions which cause harm to invitees if: 1) The operators know or should have known that the conditions existed; 2) the conditions imposed an unreasonable risk to spectators, that they could not discover or protect themselves against and 3) if the operators failed to exercise reasonable care for the protection. To determine whether an operator breached its duty, courts will focus on the facility owner's knowledge of unsafe conditions, whether the conditions were foreseeable and what precautions were taken to prevent such risks. The spectator must prove that the acts of the defendant operator were a breach of the duty of care and that the breach was the proximate cause of the injury. The operator's affirmative duty can include making sure measures were taken for the installment of netting, screens or Plexiglas at a certain height; public address announcements alerting fans of possible injury and the posting of warnings to spectators. For example, in 1999, a Florida Marlins fan sitting near the bullpen was severely injured by a wild pitch that flew over the screening. The jury determined that the team should have known that the screening was too low. The spectator was awarded $2.5 million.

In the Cecil situation, it does not seem likely that facility operators at the arena breached any duty of reasonable care. The Plexiglas at the arena conformed to accepted NHL standards, and there was no other evidence of any facility negligence or breach of duty. However, as Judge Learned Hand stated in *TJ Hooper,* an entire industry standard can be wrong.[80] In that case, a tugboat's cargo was lost, in part because it did not have a radio on board, which would have allowed the captain to hear of an approaching storm. Judge Hand found that it was not customary for tugboats to carry such radios; he nonetheless held the owner of the tugboat liable for failing to use technology then in common use elsewhere. Hand reasoned that no group of individuals and no industry or trade could be permitted to adopt careless and slipshod methods to save time, effort or money, and set its own uncontrolled standard at the expense of the rest of the community.[81] Hand further reasoned that if the only test was to be what had always been done, no one would ever have any great incentive to make progress in the direction of safety.[82] Therefore, it follows that whenever the particular circumstances, risk or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent in conforming to it; and whenever a reasonable man would depart from the custom, the actor may be found not to be negligent in so departing.[83] Industry standards may point to a standard of care, but by doing so do not establish a blanket standard of care.

Sometimes it is difficult to ascertain how an injury occurred and who was responsible, if anyone. At an Army-Navy football game in 1998 at Veterans Stadium in Philadelphia, a loose railing gave way on the temporary stands as Army fans were celebrating Ty Amey's 70-yard touchdown.[84] About 10 West Point Army cadet spectators were injured when they fell 15 feet to the ground, with one cadet breaking his neck as a result. Lawsuits were brought against the city of Philadelphia, the stadium and the United States Military Academy. The facts revealed that fans were leaning and pounding on the railing and standing and stomping on their seats. One issue raised in this case was whether the stadium event staff and/or the Army staff were negligent in failing to keep that section under control. Another issue was whether the stadium facilities were inspected for safety on a regular basis. In a press statement, the mayor of Philadelphia declared that although witnesses saw duct tape on the railings, its purpose was not for support, rather, it was intended to keep people from climbing between the rails. He believed that the railing collapse was a result of a clean break and that there was no rusting or decay.[85] The case eventually settled after all sides took into account the possible negligence on behalf of the stadium, the city of Philadelphia, the manufacturer and the Army fans themselves.

Product Liability Reform

Recent reform in products liability law has presumably made it more difficult for consumers to recover on a strict liability theory. The consumer-friendly section 402A of the *Restatement (Second) of Torts* was replaced by a more rigid standard. Section 402A of the *Restatement (Second)* has dominated American products liability law since the 1960s. This section allowed recovery against product manufacturers and sellers on a strict liability basis, even if the product was produced with all reasonable care.[86]

In May 1997, the American Law Institute replaced section 402A with a new "anti-consumer" oriented *Restatement (Third) of Torts*, consisting of 21 new separate rules. The area of product design defects was most affected. This new *Restatement* rejects the widely used "consumer expectation" test, and instead requires proof of a "reasonable alternative design."

The new rule stipulates that traditional strict liability, or liability without fault, now only applies to products involving manufacturing defects, specifically, those defects in which a product deviates from design specifications. The new standard for determining manufacturing defects provides:

Section 2(a)—Manufacturing Defect

> A product . . . contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.[87]

Design and warning defect cases, however, are governed by an entirely different standard. While the *Restatement* avoids the terminology of "strict" and "negligence" liability, the new standard makes clear that something very close to conventional negligence is required. The new standard for determining design defect provides:

Section 2(b)—Design Defect

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[88]

Design defect claims are now subject to reasonableness and risk utility tests. The new standard accepts that no design is totally risk-free, and further recognizes that trade-offs are made to accommodate practical realities such as cost, consumer preferences, marketability and safety. The new standard also reflects the general policy that sellers should be held liable for defective design only when harm from the design was reasonably preventable by adoption of an alternative design that was practical and available at the time of sale.

To establish liability under the new section 2(b), plaintiffs must show that 1) an alternative design; 2) which is reasonable; 3) and which was available at the time of sale of the product in question; 4) would have reduced the foreseeable risk of injury; 5) without affecting the overall safety of the product; and 6) the decision by the manufacturer not to use the alternative design made the product unreasonably unsafe.[89]

Various factors can be used to determine whether an alternative design is reasonable, and whether the decision not to use the alternative design made the product unreasonably unsafe. These factors are similar to those considered by the manufacturer when designing a product for sale. For example, what risks of harm does the product present, as compared to the alternative design? How likely is it that somebody will be injured, and what degree of injury is likely? How well do instructions and warnings aid in reducing the risk of injury? How would the alternative design affect production costs, product longevity, maintenance, repair and aesthetics? How are consumer choices affected? The new rule reflects a presumption that the manufacturer made a reasonable choice in coming up with a particular design. Plaintiffs now have the burden to show, on an objective basis, that the manufacturer's choice was unreasonable.

Despite the strict standards set out in the new *Restatement*, the *Restatement (Second) of Torts* is still followed by courts as a secondary authority, even though the *Restatement (Third)* attempts to codify what the courts are actually doing. Manufacturers will, of course, urge adoption of the *Restatement (Third)* view on design defect, arguing that the *Restatement (Third)*'s approach reflects the clear trend of authorities. Consumer plaintiffs, on the other hand, will seek rejection of the new standard, pointing to the uneven positions between consumer and manufacturer, social and economic policies that support spreading the cost of risks, and the impropriety of adopting a new rule that radically departs from long-established and well-settled case law. Manufacturers have a tough fight ahead of them since the courts are more likely to appeal to the "powerless consumer," and since products liability law is so well established.

In this new industrial era of highly technical and sophisticated gadgets, consumers assume the responsibility of sharp shoppers. They should be forced to investigate product safety themselves. The information age of the Internet provides various avenues for consumers to "check out" a product. As discussed at length earlier, the CPSC provides consumers with 24-hour telephone and Internet service. Consumers will also have to weigh the risks of purchasing a particular product.

Manufacturers such as Riddell, Inc. have succeeded in creating innovative design techniques for their products. Riddell is in the process of introducing a new football helmet called the Revolution, a helmet designed with the intent of reducing the risk of concussion, one of the most common and serious contact sport injuries.[90] The design of the Revolution helmet is based on the findings of a long-term study of professional football players conducted by Biokinetics & Associates, an independent engineering consulting firm. The research revealed that of all the hits that resulted in concussions, nearly 70% were to the side of the face or jaw area.[91] The new helmet includes the Tru-Curve protective shell, which extends to the jaw area and has been designed by computer to fit around the head's center of gravity in order to offer superior front-to-back fit and stability.[92] The helmet also features padding that can inflate to offer a custom fit to each player's head shape. Riddell, Inc. has increased the distance from the helmet shell to the player's head, allowing for greater room to manage the types of hits that can cause concussions. Riddell, Inc.'s Revolution will have a significant presence at the professional, collegiate and high school levels.[93] However, even Riddell, Inc. agrees that no helmet is concussion-proof. Due to liability issues, it shies away from words such as "safer." In fact, Riddell, Inc. discouraged University of Pittsburgh fullback Dustin Picciotti, who missed the entire last season due to a concussion (his second in as many years), from switching to the Revolution this year, presumably out of concern that, if he had a third concussion, the helmet might be disparaged as ineffective.

Conclusion

Although manufacturers continue to create "innovative" products to meet consumer demands, they will never be immune from products liability suits. Science and technology will never create an infallible product. Hopefully, joint communication among all levels of athletic competition will help relieve the burdens associated with sports injuries. Courts will have to create a careful balance to ensure that both manufacturers and consumers continue to rely on each other.

Endnotes

1. John L. Diamond, Lawrence C. Levine, *&* Stuart M. Madden, Understanding Torts § 17.01 (A) (2d ed. 2000).
2. Restatement (Second) of Torts § 402A (1965).
3. *See id.* at § 17.03 (3).
4. *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57 (1963).
5. *See id.*
6. *Byrns v. Riddell, Inc.,* 113 Ariz. 264 (Sup. Ct. 1976).
7. Restatement (Third) of Torts § 2(b) (1997).
8. *See* http://www.bakerdaniels.com.
9. Charles E. Quirk, Sports and the Law, p. 8 (Charles E. Quirk ed., Garland Publishing 1999).
10. *Rodriguez v. Riddell Sports, Inc.,* 242 F.3d 567 (5th Cir. 2001).
11. *Rawlings Sporting Goods Co. Inc. v. Daniels*, 619 S.W.2d 435 (Tex. App. Ct.) (10th Cir. 1981).
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See* Quirk, Sports and the Law, *supra* note 9, at 9.
17. Restatement (Second) Torts § 402A (Strict Liability).
18. *Lister v. Bill Kelley Athletic, Inc.,* 137 Ill. App. 3d 829, (Ill. App. Ct. 1985) (Plaintiff suffered injuries to his spine during a high school football game while wearing manufacturer's helmet, which left him a quadriplegic).
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *Berkner v. Bell Helmet Inc.*, 9 F.3d 121 (11th Cir. 1993).
25. *See id.*
26. *United States v. Mohney Inc.*, 77 F. Supp. 2d 859 (1999) (Mohney suffered paralysis when he crashed headfirst into the hockey arena walls during a game).
27. *See id.*
28. *See id.*
29. *Peisino v. Riddell*, No. 83-C-SE-129 (Del. Super. Ct. July 7, 1989). *See also* Shea Sullivan, *Football Helmet Product Liability*, 3 Sports Law. J. 233 (1996).
30. *See id.*
31. *See id.*
32. The NOCSAE was established in 1969 to combat sports injury problems. It is comprised of the American College Health Association, the National Collegiate Athletic Association (NCAA), the National Federation of State High Schools Association (NFSHSA), and the Sporting Goods Manufacturers Association. The NOCSAE's purpose in this combined effort was to institute research directed toward injury reduction and prevention.
33. *See Consumer & Media Resources, available at* http://www.atla.org.
34. *See* http://www.nicks-picks.com.
35. *See* http://www.kraftlaw.com/Articles/Hypocrites.htm.
36. *See* Diamond, et al., Understanding Torts, *supra* note 1, § 17.04.
37. *Eldridge v. Riddell Inc.*, No. 92-0875, 1993 Fla. App. LEXIS 5960 (Fla. App. June 2, 1993).
38. *Braverman v. Kucharik Bicycle Clothing Co.,* 287 Ill. App. 3d 150 (Ill. App. Ct. 1997).
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See* Diamond, et al., Understanding Torts, *supra* note 1, § 17.03.
44. *Yarusso v. International Sport Mktg.,* No. 93C-10-132SCD, 1999 WL (Del. Super. Ct. Apr. 1, 1999).
45. *See id.*
46. Michael E. Jones, Sports Law, p. 105 (John Larkin ed., Prentice Hall Publishing 1999).
47. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377 (1975).
48. *See Recalls and Product Safety News, available at* http://www.cpsc.gov.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Thompson v. Seattle Pub. Sch. Dist.* (unpublished decision, 1982).
53. *See* Quirk, Sports and the Law, *supra* note 9, at 15.
54. *See id.*
55. J. Coburn, *Woodson v. Irvington Board of Education* (1987), 3 Nat'l Jury Verdict Rev. & Anal. 10 (No. 8, 1988).
56. *See id.*
57. *Everett v. Bucky Warner, Inc.,* 380 N.E. 2d 653 (Mass. 1978) (College hockey player suffered severe injuries when he was struck in the head with a puck wearing three-piece helmet).
58. *See* Quirk, Sports and the Law, *supra* note 9, at 16.
59. *Id.* at 17.

60. *See Sports Law in a Nutshell* p. 156.

61. *Passantino v. Board of Educ. of the City of New York,* 395 N.Y.S. 2d (N.Y. App. Div. 1976).

62. *See Thompson v. Seattle Pub. Sch. Dist.* (unpublished, 1982). (The assumption of the risk doctrine can only be used as a defense if the coach can prove that the athlete knew of the inherent risks involved, understood the full implications of the risk and then voluntarily chose to participate. This case shifted more responsibility to the coach).

63. *Vendrell v. School Dist. 26C, Malheur County*, 376 P.2d 406 (Or. 1962).

64. *See id.*

65. *See id.*

66. *See supra*, Nutshell, note 60, at 167.

67. *See* Quirk, Sports and the Law, *supra* note 9, at 12.

68. *See supra*, Nutshell, note 60, at 169.

69. *Gary v. Party Time Co., Inc.*, 434 So. 2d 338 (Fla. App. Ct. 1983).

70. *See id.*

71. *See* Quirk, Sports and the Law, *supra* note 9, at 12.

72. *See College News*, *available at* http://www.teamjam.org.

73. *See id. The Death of a Fan*, *available at* http://www.cnnsi.com.

74. *Brown v. San Francisco Baseball Club*, 99 Cal. App. 2d 484 (1950). (Certain risks are inherent and incident to the game).

75. *Schentzel v. Philadelphia Nat'l League Club,* 96 A.2d 181 (Pa. Super. Ct. 1953).

76. *See id.*

77. *See* www.NASCAR-info.net.

78. *See id.*

79. 45 AMJUR 3d 407.

80. *TJ Hooper*, 60 F.2d 737 (2d Cir. 1932).

81. *See id.*

82. *See id.*

83. *See id.*

84. *See* http://www.augustasports.com.

85. *See id.*

86. *See* American Law Institute.

87. Restatement (Third) § 2(a).

88. Restatement (Third) § 2(b).

89. *See id.*

90. *See Football Helmet Technology*, *available at* http://www.neuroskills.com.

91. *See id.*

92. *See id.*

93. *See id.*

Tara Di Luca is a third-year law student at Pace Law School in White Plains, NY. She is the President of the Italian-American Law Students Organization, contributor to the *Hearsay* student newspaper (where she writes about sports issues and the law), a member of Phi-Alpha Delta and a student mentor. Tara is interested in pursuing a career in sports and entertainment law.

Tara attended Fordham University as an undergraduate where she competed in the hurdles for Division 1-A track and field. She currently coaches at Fordham and continues to compete, most recently in the 55-meter hurdles at the finals of the Colgate Women's Games Indoor Track and Field Series at Madison Square Garden.

NYSBA 2004 Annual Meeting

Entertainment, Arts and Sports Law Section Annual Meeting

New York Marriott Marquis • New York, New York • January 30, 2004

Jeffrey A. Rosenthal, Esq., Section Chair
Jay Flemma, Esq., Program Co-Chair
Kenneth A. Nick, Esq., Program Co-Chair
Elissa D. Hecker, Esq., Section Vice-Chair

Panelists:

"Producing in the New Millennium, Challenges and Opportunities"

James H. Ellis, Esq., Theatre and Performing Arts Committee Chair and Moderator
Susan Q. Gallin, Susan Q. Gallin Productions
Jack Viertel, Creative Director, Jujamcyn Theatres
Randall Wreghitt, Iowa Boy Productions

"Labor Relations in the Sports, Theatre and Movie Industries"

Professor Paul C. Weiler, Moderator
Donald Fehr, Esq., Executive Director, Major League Baseball Players' Association
Robert Manfred, Jr., Esq., Executive VP, Major League Baseball
William Moriarity, Former President, Local 802
James Murphy, Esq., Spivak, Lipton, Watanabe, Spivak & Moss LLP
Seth Popper, Director of Labor Relations for the League of American Theatres and Producers
Alex Rosenberg, Esq., Kauff, Mcclain & Mcguire

Jeffrey A. Rosenthal
Section Chair

MR. ROSENTHAL: I would like to welcome everybody to EASL's 2004 Annual Meeting and thank everybody for coming. My name is Jeff Rosenthal. I am, I guess, for the next couple of hours, this session's Chair of the Entertainment, Arts and Sports Law Section.

I just want the start out by briefly thanking people who were instrumental in putting together today's program.

We're quite enthusiastic about the program we have put together, "Producing in the New Millennium, Challenges and Opportunities," followed by "Labor Relations in the Sports, Theatre and Movie Industries."

We really worked hard this year to try to find a couple of topics that we thought would appeal to a cross-section of our membership, given the diversity of industries that our members participate in.

And I hope that we have successfully done so. I want to thank the people who were instrumental in putting together today's program, my Vice-Chair Elissa Hecker and Kenny Nick and Jay Flemma, the Program Co-Chairs.

Jim Ellis was also instrumental in putting together this first panel. And Steve Richman, Ayala Deutsch and other Executive Committee members worked to help put together our lunch program.

And I do hope that most if not all of you can join us over at the ESPN Zone a couple of blocks away, for lunch today.

Today is my last day as Section Chair, unless the Section chooses not to vote in a new Chair, which I hope doesn't happen. But I'm really quite happy with how these last two years have been and where this Section is right now and where it's heading. We have a growing membership that is now over seventeen hundred members strong.

And we have really, I think, achieved a lot of what we set out to achieve a couple of years ago.

Last spring we revived the Section's Spring Meeting. And I'm pleased to report that our planning for this year's Spring Conference is well under way, and in fact, close to being finalized. It's going to be April 23rd and 24th, which is a Friday and Saturday, at the Doral Arrowwood Resort in Rye Brook.

And Jay Flemma and Kenny Nick, our Program Co-Chairs, are just putting the final touches on what I think will be even a better program than last year.

I would encourage people to check our Web site and look at your mailings for information about that. And hopefully we can have an even greater turnout than we achieved last year.

I wanted to report on a couple of other things. People have seen obviously in the *Journal* that we are launching this year the Phil Cowan Memorial Scholarship to honor and remember one of our founding Section Chairs and one of our founders of the Section who passed away a couple of years ago.

We're going to announce probably within the next month or so, collaboration with a major entertainment company that would like to take part in this Scholarship and assist us in the administration and the awarding of scholarships. It's open to law students. There are going to be up to two awards of $2,500 each. And for those two, for the audience, you should follow our Web site regarding details which will be announced within the next few weeks.

But basically there will be an April 1st deadline for submission of articles and the winners will be chosen and ultimately honored at next year's Annual Meeting.

One area that was basically nonexistent in our Section a couple of years ago, which is now I think so much a part of where we are, and where we're going, has been our Pro Bono initiatives. And I want to thank and recognize briefly here at the Annual Meeting, Elizabeth Wolfe, who has played quite a significant role in that. And our Section has been written up in a number of journals, recognizing it as a leader not just within the New York State Bar, but also around the country in bar association pro bono activities.

For those people who are interested in joining our effort, we're going to have our next VLA clinic on February 18th, at VLA. And we ask members who are interested in dedicating just an hour or two of their time to come down, meet the VLA clients, and help provide just some basic advice.

And for those who are interested, you can e-mail Elizabeth Wolfe at elkwolfe@aol.com. And I'm sure she would love to hear from people who are interested in participating in that program.

Our committee involvements are also growing; as people know, many of you although not all, in addition to being Section members are also members of one of our specific committees. And for those who aren't, we encourage you to look at our roster of committees and become participants in those, as well.

I wanted to announce our Law Student Initiative winners of 2003. For those who aren't aware, we have a program in which law students can submit articles to be published in our really excellent Section *Journal*.

Elissa Hecker, the *Journal* Editor, selects one or two for each issue. The authors are then honored with free Section membership for the following year. Their articles are published. And they are recognized here at the Annual Meeting. And I would like to do so to our five winners over this past year: In the Spring of 2003 edition, Christopher B. Abbott of St. John's University won for an article entitled, "Junior Prom or NBA? A Legal Analysis of LeBron James' Failed Quest to Enter the NBA Draft Prior to Graduating From High School," and Damien Granderson of Albany Law School of Union University, for "Defining Artists' Rights and Alternatives: Ownership of the Creative Message."

In the Summer issue we had Julie Block of St. John's University School of Law, for "Privacy or Piracy—Weighing the Interests of Internet Users with the Interests of Copyright Owners," and Brian Geller from Fordham Law School wrote an article on the "Sixth Circuit Opinion in *Rosa Parks v. LaFace Records* Demonstrates the Limits of *Rogers v. Grimaldi* Protection."

And finally, in our recent Fall/Winter 2003 issue, Christopher Papaleo of St. John's University School of Law wrote, "Give and Take: The Paradox of Instant Access and Restricted Use in the Digital World."

I would encourage students to not only participate in the scholarship program, but to continue to participate in the Law Student Initiative.

Before I step down as Section Chair, I just want to take a moment to thank the officers of the Executive Committee who have served with me for the past two years, specifically Elissa Hecker, a phenomenal Vice-Chair, who has been instrumental in a lot of the things we have done over the last couple of years, Alan Barson, Secretary; Ken Swezey, Assistant Secretary; and Stephen Rodner, as Treasurer. And all four of them I want to thank.

And finally, our last piece of business is to announce the new slate that was nominated by the Nominating Committee for the 2004 to 2006 officers so we can have our formal election Moscow-style here, since on page twelve of today's *State Bar News*, it says Elissa Hecker was elected Entertainment Section Chair.

We want to see if everybody agrees with that or if we need a retraction. The slate for the coming 2004 to 2006 period is Elissa Hecker, the current Vice-Chair, to serve as our Section Chair. I can't imagine anybody better for that role.

Alan Barson, in recognition of the fantastic work he has done as Secretary for the last couple of years, has been nominated to become our Vice-Chair. Steve Richmond who is our Legislative Chair, and also our Representative in the House of Delegates, becomes also subject to election.

Our Assistant Secretary, Ken Swezey, has been re-nominated for Assistant Secretary and Steve Rodner has been re-nominated for Treasurer, notwithstanding our growing deficit lately, which is not in any way attributable to Steve.

So I guess by a show of hands, if we could just get an indication of all in favor of that panel for 2004 to 2006. Any opposed? Thank you. That slate is selected. And we can inform the *State Bar News*.

James H. Ellis, Moderator for "Producing in the New Millennium, Challenges and Opportunities."

And with that, I'll turn it over to Jim Ellis, Moderator of our first panel. And thank you all for coming today.

MR. ELLIS: One of our speakers this morning, Bob Cole, had a medical emergency. So he is not going to be joining us. I'm going to introduce each of the speakers briefly. I don't know what they are talking about specifically, but we'll all learn together.

The first speaker this morning is sitting right here, Susan Quint Gallin. She is currently represented on Broadway in *The Retreat from Moscow* and by the long running *Stomp*, which is off-Broadway. She produced the 2002 Broadway revival of *Man Of La Mancha* with Brian Stokes Mitchell, *The Shape Of Things*, Ibsen's *Hedda Gabler*, *Fully Committed* and *Cowgirls*, which I participated in with her, and *Angels in America*.

Next to her is Randall Wreghitt. Randall I have known for ten years when we both started out taking a course in producing at the Commercial Theatre Institute.

Randall has pursued marketing in theatre and producing. He is represented at the moment by *Golda's Balcony* at The Helen Hayes and was one of the producers for *Metamorphoses*, *Hedda Gabler*, *One Flew Over The Cuckoo's Nest*, *The Lonesome West*, *Band in Berlin*, as well as a number of off-Broadway shows.

Jack Viertel is sitting next to Randall. Jack began his career playing guitar with Bonnie Raitt, the Pointer Sisters and Son House. He has written lyrics for Bonnie Raitt, two non-fiction books, and the American adaptation of Joshua Sobol's play *Ghetto*. And he is not too proud of the movie, a low-budget horror movie, called *The House Where Death Lives*. He is presently artistic director for the Jujamcyn Theatres and for all of those of you who attend Encores! at City Center, he is one of the producers there.

So Susan, why don't you start?

MS. GALLIN: Well, I was thinking that the good news for everybody in this room is that on every show that I have done, whether it has been critically successful or financially successful, the lawyers have always done well.

Producing theatre commercially is a very quirky, uneven business. And it's a business that one should only be in if you have no choice, if you have a passion for it.

I think that the reason I chose to produce is because I'm not a writer, that I wanted to have some kind of impact on the world. And since I can't write a play that would do that, I chose what I thought made people think about things in a different way.

And I have looked for that kind of play. And that's what I have produced.

It's a very uneven business. The two plays that you mentioned that are still running really illustrate that. It seems as though sometimes you put a huge amount of energy into something and you don't have the rewards. And other times you put no energy into a play or a project. And that is what you get paid for.

I am one of the producers of *Stomp*. There are a lot of producers. I go to a meeting once a year. And basically it runs my office. The play that I am probably most proud of, in the sense of the process of making this play happen, is the play that is currently running on Broadway, *The Retreat From Moscow*. And unfortunately, it got very good reviews from John Simon and John Lahr. They loved it. And Ben Brantley didn't. And it is a very serious, straight play. We have not announced it, but we'll probably close sometime in March.

This was an ideal process for me, because I had read the script and fell in love with it.

Very often agents give plays to not-for-profit theatres, and there is a production of a play in a not-for-profit theatre and a commercial producer moves that to

(l-r) Panelists for "Producing in the New Millennium, Challenges and Opportunities": Jack Viertel, Randall Wreghitt and Susan Q. Gallin.

New York. And that's what I have done many times. That is much more usual.

In this case, I read a script and really loved it, and thought that it was something that there was an audience for. I think that of the plays that I read, there are so many plays that are well-written. Then there is an overlap of plays that are commercial, that I think could have a commercial success.

And in that little overlap is the play that I would choose to do. And I thought this play fit that category, even though it's a very serious drama.

We started to think about directors and we hired Dan Sullivan, who is a very fine director, who just directed *Proof*. And he seemed to be the right choice for this play. We knew that because it was a very serious play we needed fine actors. But we also needed stars. And it took a long time to do the casting.

But we ultimately—the three actors are John Lithgow, who has a television reputation; Ilene Atkins, who is a very highly thought of British actress; and Ben Chaplin, who is a young film star.

The production was exactly as my partners and I hoped that it would be. We went into—the week before we opened, our press agent said, you know that you have a hit. And I said no, I don't know that. And at 11 o'clock, the night of the opening, we read the Ben Brantley review. And it was a very unpleasant review. And that was—basically that changed my business. The play has done fairly well. I hear wonderful things from people who have seen it. But we never will have the audience that we would have had, if Ben Brantley liked it.

So I got some pleasure from that play. I'm so proud of it. But it certainly is not a business. And I'm appreciative that *Stomp* continues to run.

I have done revivals. I did the revival of *Man Of La Mancha*. And it was very exciting. But it is not what I really and—Randall and I produced it together. But it is not what I'm really looking for. I'm always looking for new plays and that's what is very exciting to me, to be able to present a new voice on Broadway.

And probably one of the highlights for me, Jack and I were partners on *Angels in America*. And there couldn't have been anything quite as exciting as that experience.

MR. VIERTEL: I'm in a kind of unique position in the Broadway theatre, for which I can take no credit. When I say unique, I don't mean to claim any superiority. I'm the creative director for a company that owns five Broadway theatres, rather than being an independent producer. They are large, owned by three companies, Nederlander and Jujamcyn, the oddly named company that I work for is named after the three children of the man who owns it, Judy, James and Cynthia. I was hired in 1987 by Rocco Landisman, the president of the company, to create in-house productions for the company at a time when there was a tremendous number of empty theatres on Broadway and Jujamcyn, being the smallest of the three theatres, had more than a share of empty theatres. It was the least prestigious company. And the theatres have some internal problems that made them hard to book. And at that time the theatres, the theatre owners, were to some degree, facing the problem of how to fill these houses as landlords, and decided, some more than others, to go into the business of creating their own tenants basically.

So I was working in a not-for-profit theatre in Los Angeles after having been a theatre critic in Los Angeles for many years, and was asked to come here and produce productions to help fill these theatres, joining a long heritage of what has controlled Broadway from the very beginning.

The theatre owners have always been in a uniquely good position. Even when shows fail, the theatre collects the rent for as long as the show runs. It's a great hedge against investing, obviously.

So, I was put in this position to make decisions with creative passion with the projects that were interesting and compelling to me, but also with an acute understanding of how many seats each theatre had, and how many times those seats would have to be filled from outside to justify producing a play.

I came to understand that unless you believe a million or more people are going to want to see this musical that you're producing, you probably shouldn't produce it, as Susan was saying.

There is this tremendous bifurcation between material you admire and material that you think can have a commercial life and be successful for investors, for the theatre, and for audiences.

So I went to work doing this and had some luck. We had some luck, and I guess some brains, and maybe some taste along the way. And at the same time, the commercial theatre got much more successful than it had been. It was at a really low point in the mid-eighties and began to rise out of those ashes to the point where, rather than there being a large number of empty theatres on Broadway, there were ninety-one shows running longer and longer than they ran before.

And if you look at the long-run history of Broadway shows, the old champions have all been overcome. A two-thousand-performance run was considered extraordinary in the forties and fifties. Now shows run fourteen and fifteen years.

So that the need to produce shows after Jujamcyn became smaller and smaller as the theatres were fuller and fuller, and my work sort of throttled back. And I was able to take a second job running this company called City Center Encore!

I don't know if any of you have been to any of the productions at Encore! We do three concert versions of Broadway musicals that are unlikely to be commercially revived for one reason or another. Either they are dated or the books aren't very good, or they are only sort of interesting to aficionados.

We do five performances. So we only have to sell five houses rather than a year's worth of houses. It's a not-for-profit business, believe you me.

And we do them with full orchestras, with full original cast sizes, original vocal arrangements. So what you hear is what the show sounded like on opening night when that was in the 1920s, '30s and '40s, et cetera.

That is a luxury that Broadway can no longer afford. The typical pit orchestra is sixteen or seventeen musicians. Typical to Encore!, thirty to thirty-five musicians and other kinds of economies that we don't normally take advantage of allow us to kind of examine that literature in a very museum-like way. The two things balance off wonderfully in a way because as I work on new material, I have the advantage of being able to look at a lot of old material, and the responsibility to be familiar with a lot of old material. And the process of looking at new material or creating new material is the part of the business that I really love.

The part of the business that I don't really love is running a show once it has opened, which becomes very, very important.

And a lot of producers forget this. And I would like to forget it, today. It's unlike a movie, in that a couple of hundred people have to gather together every night to do it. And there are live people that get sick, cranky, want more money, and begin to do their jobs less well, like any other industry.

It is a repetitive job. So running a show is a whole other side of the business, which I would prefer someone else speak about, actually.

Creating a show, as I think for most, is the function of it. What people don't know particularly with musical theatre, is that principally the impulse to create new musicals belongs to the producer. It was not Rogers and Hammerstein who had the idea to write *Oklahoma*. It was a producer. And those people were in essence hired to write the show that the producer had thought up, although they own their work. And in that sense they are not hired.

But producers have been, from the very start of the Broadway theatre rise in the late 1800s, the impulse behind a lot of creation of the art that you see when you go to a Broadway show.

And it's an honorable tradition to join. And in some cases we at Jujamcyn have had ideas that we carry through to fruition. *Smokey Joe's Café* was a creation of ours.

In a lot of cases we have been asked to join producers who have brought projects a certain distance. And because we're an ongoing company with decent returns in profits, we're able to actually invest money in ways that some other independent producers would have more trouble raising money for.

So we have taken early positions in a lot of shows and had whichever ones got to the starting gate in our theatres. And that has been sort of the way we have done our business.

MR. WREGHITT: Good morning. I come to producing through more of a marketing and promotional event. I was an actor in another lifetime, never professional perhaps, but never boring, I would like to think.

Along the way to coming into New York, I worked for Walt Disney World when Frank Wells and Michael Eisner took over Disney. They immediately changed the hiring practices and brought a lot of people who were referred to as outside hires; people who came in in marketing positions and promotional positions, who had not worked their way up through the "parts."

And so, by the time I came to New York, I was hired by the Big Apple Circus to be its marketing and promotions director, with my eye on producing eventually.

And while I was there is when I took the Commercial Theatre Institute courses, to learn more about producing, because there really isn't anywhere that one can go and say, "I want to be a producer. How do I do that?"

You do it by learning sort of a baptism by fire. Along the way, I took the courses. In March I'll have been producing ten years and have produced twenty shows in New York both on and off-Broadway, a couple on the West End, one regionally and one we took to the Attenborough Theatre Festival, that will hopefully arrive in New York next year. Lots of different ways these shows come in.

As Susan said, I have also moved some shows such as *Golda's Balcony*. I was at the opening night downtown, and went up to the managing director of the theatre and said, let's take this further.

And I have other things I have helped originate. Currently I have a project that I have been working on for over five years, a musical version of *Little Women* that will arrive in New York if all continues, if the world doesn't get in the way, next January or February. And we'll start that final length of that journey in September, with rehearsals out of town as part of the previews in Duke in North Carolina, then going to the Shubert in New Haven. Then it looks like it's going to Boston, then will arrive in New York.

And that one has been one that we have been a part of from the beginning, my partners and I, hiring writers and directors, and taking our cast and our set crews and so on. And that is very exciting. It's also fun to be a part of anything if it is working. But it's a very different experience than when you move something where you kind of inherit a package. And you're going to raise money and hopefully maintain it as it runs on Broadway.

With a marketing background, as we all know, the world has changed a great deal over the years and people have so many more choices as to what they do for entertainment.

And along the way, we really create a generation of theatre-goers.

You see all these studies about the graying audience of theatre, and so on, and how difficult it is for people to get into theatre. And with the video age, people can stay home and watch movies. And it's easier.

So part of the Broadway mission has been to sell Broadway as a destination. And within that, all these choices people can make, and that is one of the areas that I enjoy the most, and as I said, have had the most experience in.

And as you see, as you go around town and you see the various ways that theatre has chosen to market itself, some more successfully than others, that has been an interesting thing to be a part of. It has changed a great deal of the time I have been here, as I'm sure my colleagues both will attest to, as well.

The advent of the Internet has been extraordinary as to the e-mail blasts and so on that are now a regular part of selling theatre.

When I'm looking for a show that I'll get involved in, of course you have to keep your eye on what the commercial viability of that product might be, though you will at times fall in love with something that you know may not, you may still help it get on in a not-for-profit venue.

We have all found those projects that we referred elsewhere or that perhaps aren't right for a U.S. producer.

I think that is one thing that is kind of interesting to me is that as a producer when I'm looking for projects that I feel I'm well-suited for, there are when people are shopping their projects, somebody sends you a play for something, I'm just amazed at how we get pigeonholed in quick succession. I had two plays that ran on Broadway successfully, *The Beauty Queen of Leenane* and a revival of *Electra*, starring Zoe Wannamaker. In both shows, the mother is murdered. And immediately I started getting plays where mothers were killed. And people started asking whether I had issues with my mother. And the first time it happens, it's funny.

As it goes on, it's rather extraordinary. Along with that, because I had straight plays for a while, somebody would turn to me and say, "So you never produce musicals." No, that is not the case at all.

But again, it's all pigeonholing. It is the same way it happens with actors or with directors that suddenly, you're a certain kind of producer.

I would like to think I'm a good producer first, and then a producer of whatever that is that follows. People ask me too, they will tell me all the time, and as Susan said, even when it's going well, it's very hard. And I don't say that to say, oh, poor me, where we have chosen this crazy profession.

I always give an example. Susan and I were part of the revival of *Hedda Gabler* with Kate Burton. It was poised to be a hit. As so many things, 9-11 happened, and we were in rehearsals and the world changed dramatically. And people were not apt to go see a play about a conniving beautiful woman whose lover kills himself and she kills herself in the end. It was great theatre, but not a laughing riot.

I had a show I was bringing in recently and one of my big investors became ill and dropped out. And we abandoned the project that we worked on for two years.

Things do happen along the way as they do in any industry. And we're not immune within theatre. Sometimes it happens a little more publicly within our industry because of celebrities or personalities involved.

In the end, as I go on, as long as I'm having fun, I'm going to keep doing this.

I mean, it is a choice I have made to be a part of this. It is not the kind of career that one would expect. I'm from a little town in Iowa, you know. And my production firm is called Iowa Boy Productions. I'm from Iowa. I am a boy. I can assure that you I'm the only one in my class from my college and high school that is a Broadway producer.

You know we have all come to this profession through interesting paths. And it makes it great fun when you talk to people to find out how they got there. But it is not for the faint of heart. And I have produced with people and gotten the calls at two in the morning from one of my partners who felt he was having a heart attack because our show was in trouble during previews.

Quite candidly, he was not a priority at the moment. The show was. And I do find some people are better suited for this business than others. But like I say, as long as I enjoy it I'm going to keep doing it, or until I have to go sell real estate or something else.

MS. GALLIN: I think as commercial producers, we both sounded so negative. I just want to say, there is nothing more exciting than the period of time when rehearsals start until opening night. It is beyond exciting.

MR. WREGHITT: I don't think we came across that negative. It's just part of what happens. People tend to glamorize and romance show business. And people will tell me, oh my God, that must be so fabulous. And if you're a Broadway producer, they assume you have a penthouse somewhere, because the producers' names we know are David Merrick and so on, who had a pretty high style of living.

It is a job. And it's great fun, as I said. I thoroughly enjoy what I do even when it is not. But there is a reality about it. And I do have people come and meet me all the time who think they want to be producers, until they really look at what it is. And then it's maybe not quite what they are ready for.

But if you feel you have to do it, and want to do it, you can have a great deal of fun.

MR. ELLIS: I am going to ask the three of them a question. Just as many of us work on many different legal cases at one time, how many projects do you work on at any one time?

MS. GALLIN: It varies. Sometimes it will be one and I will have something on the back burner. Sometimes it will be more. And I will be worried that all three are going to happen at the same time. And it never happens that way, so I have stopped worrying about it.

MR. WREGHITT: Now I have a show running on Broadway. I have a show in rehearsal for a workshop presentation next Thursday and Friday, an off-Broadway show called *Velocity*. Then we have *Little Women*, which is rapidly going into pre-production. Down the road further, I have a couple of other things, a play that we're looking to bring in in a year. And I have chosen a novel that we're turning into a musical. And that is under way. But something like that, the average—a friend of ours I think everybody knows, Elizabeth Williams, recently told me, she had done all this research. And the average musical takes eight years from the time that you start, until you get it to Broadway, if you get it there. So it may be a while before you see my musical.

MR. VIERTEL: I would guess I'm usually working a half a dozen projects or so at some stage or another. It's rare that you're working on more than one or two in an active, everyday mode. You may be waiting for a script to be delivered on one. And you may be waiting for papers to be delivered, the legal papers to be delivered on acquiring the rights to something which I guess constitutes working on it; but usually one or two that are really keeping me up late at night.

MR. ELLIS: Looking ahead from my perspective as a lawyer and sometimes producer and investor in the theatre, I'm going to make four different predictions, two of which I'm pretty sure are going to come true, and two of which I hope will come true. But I doubt it.

The first prediction is that during the next twelve months, there will be a decision on the appeal of a case that was decided last year, which is generally referred to as the Martha Graham decision.

In that case, a former executive director of the Martha Graham Company claimed that Ms. Graham had willed him all of the dances that she recreated for the company.

The court determined that in her capacity as artistic director of the company, she was—that was understood that that was part of her duties, to create new dances for the company.

Therefore, under the legal theory of artists for hire, she had no right to will these works to anyone, as they were the property of her employer, who paid for them in the first place.

The outcome of that appeal on that decision is being looked forward to by every dance and music company in America, with the artistic director and the creators as employees of the company.

Of the two subjects that I don't think will change any time soon, the first relates to the basic way that capital is raised for new shows, both Broadway and off-Broadway.

Essentially, once a producer obtains legal rights to produce a new show, he attempts to raise one hundred percent of the money from the investors. He may put up money first. But when he collects the money from the investors, it repays him.

In return, he gives them a fifty percent interest in future profits, if any. He retains fifty percent plus earns a producer fee of between $1,500 and $2,500, beginning two weeks before the first preview of the show, and ending two weeks after the show closes.

When I first started in the business, the rule of thumb was that one in four shows recouped their investments. You got your money back. And one in ten shows made a profit for investors and producers. That was ten years ago. These numbers are out of date.

The rule probably is closer to one in ten recoups now. And one in twenty makes a profit. When they make a profit, like Jack's producers, it's a big one. With that kind of trend, are investors entitled to a bigger share of the pie?

Occasionally you'll find a new show offering no percentage of profits to the producers until the investors recoup one hundred twenty-five percent or more of their investment.

I think that was one you had that recently, with the theatrical union employees and theatre owners enjoying a big spike in easy profits, when theatre prices spiked twenty dollars a ticket or more, a couple of years ago.

It's now time to protect the investors' investment more than ever with some creative financing techniques. But I don't think we can expect anything soon on this.

For my second prediction that may never occur, we look no further than the names of two major theatrical trade associations, The League of Off-Broadway Theatres and Producers, and the League of American Producers and Theatres.

I believe there is an inherent conflict of interest by having each league composed of people representing both the theatre owner interests and producers.

The reason I think that way is that theatre owners' interests are more aligned with those of the unions than those of the producers, particularly, since most union increases affecting theatres are passed along as costs to the tenants, the producers in the shows.

But that is only my opinion, for whatever it's worth. In simplest terms, the producers and theatre owners should have their own trade associations. But I don't think that is going to happen any time soon.

My fourth and final prediction is that New York's Theatrical Syndication Financing Act will be modified by legislation during the current session.

A few years ago I was invited to attend an SEC-sponsored small business conference in Washington.

There I learned to my amazement that New York was only one of two states in the country that didn't have an accredited investor exemption on the books.

Before I continue, is there anybody here who doesn't know what an accredited investor means? This will only take a moment. It's very simple.

In the federal laws, relating to the raising of capital for business, there is the Securities Act of 1933 that covers both private and public offering of securities to people.

If you are going to start or expand your business and want to raise capital by selling securities to the public, you begin by filing a registration statement with the SEC, unless the amount of monies you are seeking are relatively small, that is up to $4 million.

The cost of creating the prospectus and registration statements is fairly expensive. There are two exemptions, however, so you don't have to go through the registration process. One is called the intrastate offering exemption, where all of the sales take place to people who are residents of one state. The other exemption is the private offering exemption. That is a federal exemption that applies where all of the offers to sell the securities are limited to a small group of people, no more than thirty-five, in fact.

However, if any of the offerees, that means the prospective investors, has an annual income of $200,000 or more and with their spouse $300,000, or they have a net worth of a $1 million or more, they are considered to be an accredited exemptor and are exempt from the limitations of thirty-five.

In other words, you can offer securities to thirty-five people, plus an unlimited number of accredited investors.

But the accredited investor rule is a federal rule. It doesn't apply to state rules, and particularly an intrastate or private offering in New York, because New York doesn't have an accredited investor rule.

New York does have a Theatrical Syndication Financing Act, which was adopted in 1983, and changed very little since then. It provides for two basic methods of raising capital for live theatrical productions in New York. The first is generally known as the Waiver Provision.

You can raise money for what has to be a live theatrical venture. Each of your investors up to eleven of thirty-six signs a waiver agreement that there was no offering statement or prospectus that is necessary, so long as the offering is limited to thirty-five or thirty-six offerees.

And each one signs the waiver agreement. There is no limit to the amount of money you can raise, except the amount you designate in the offering contract, which will probably be either a limited partnership agreement or a limited liability company agreement.

The other provision of the present Theatrical Syndication Financing Act says you can raise up to a half million dollars in capital for a live theatrical production, for an unlimited number of residents of the state, as long as you provide each prospective investor with an offering statement which contains all of the significant and pertinent facts of the offering.

To me, it's obvious that the half million dollar provision and waiver provision were adopted originally for off-Broadway and Broadway productions, respectively. That was in 1983.

Now, we do know that *Playbill* published the top price of a theatrical ticket, for 1977, which was $14.77. Today the price is about $100, more or less for musicals, and $75 for a straight play that is off-Broadway.

Since 1983, the cost of both Broadway and off-Broadway productions have skyrocketed. The cost of a Broadway musical has risen from about $1 million to $10 million or more. And the cost of an off-Broadway show has almost doubled in the last ten years, never mind the last twenty or thirty years.

That is why my Assemblywoman, Amy Paulin, and State Senator Bruno have introduced bills to add an accredited investor provision to the New York law, to change the half million dollars to a million dollars, which is probably a little bit above the average cost now in producing on off-Broadway.

Unless these changes are made, theatrical productions will continue to be the domain of large corporations, as the little guy is effectively cut out of the process by the limits imposed to the present 1983 law.

Last year the Assembly unanimously passed the bill. The Senate bill, however, went to the Ways and Means Committee before the session ended.

I understand that the Governor's Office is now involved and hopefully will get those bills passed this year. In fact, you can help if you write to your Assemblyperson and your State Senator. There are many people like me who love to support good theatre.

These changes will facilitate that involvement, regardless of whether one is an accredited investor or not. You see, the majority of investors in theatre today, who are part of the less-than-thirty-five-person exemption, already qualify as accredited investors. And if there is such a category under New York law, these people would move into that category and make room for thirty-five other people who are ordinary people, who don't fall into the accredited investor category. It's really as simple as that.

If you have any questions we will be happy to take them.

AUDIENCE MEMBER: Why would New York, which has the preponderance of theatre in the country, be one of the last, or if not, why did it take so long to get this accredited securities?

MR. ELLIS: I asked that question at the SEC conference. And they said, New York is such a large state. And fraud is very prevalent here. So it is the theatrical industry particularly.

It's all small business. So when we were discussing how to start the process to change, they said, instead of trying to change and introduce accredited investors for all investments in the state of New York, why don't you just start with the theatrical industry. And if it is passed there, then it will be adopted by the other industries as well.

AUDIENCE MEMBER: Could you explain when you were talking about the $4 million ceiling on investment, how that creates a requirement for registration?

MR. ELLIS: It's a different kind of registration. It's a simpler registration. Being a simpler registration it costs much less, as far as legal fees, accounting fees, et cetera, because the disclosure isn't as intense.

AUDIENCE MEMBER: I'm just curious as a producer, what types of things can you do to make theatre more affordable? Unless you're a student or a union member, for somebody to spend $100 plus per ticket for a musical, get a baby-sitter, park in the city, you're talking about a $500 investment for one show, which means you might see one show on your anniversary each year.

What are your thoughts on the topic to make it more accessible so everybody can see the theatre instead of just a small segment?

MR. VIERTEL: Actually, the theatre is probably more affordable than you are aware, in that it's growing more and more like the airline industry.

You're sitting in a seat and the person next to you has paid a very different price than you paid. There are a lot of discounting schemes that don't require you to be a student or union member, or anything else, that come through direct mail, that come through e-mail blasts. And it's a tricky problem; one of the reasons that the retail price of the ticket for the musical is $100.

So when the percentage of tickets that go out at discounts that allows you to earn enough to actually break even. If every ticket were going to be sold at retail, the price would probably be lower than it is.

How to publicize and distribute in the way that say, Orbitz does airline seats is a business I think we're sort of in the infancy of.

MR. WREGHITT: Unfortunately, I think we have become a discounted business. I mean so few people pay full price now that people wait for e-mail blasts through various things. They go to the TKTS booth and so on. And while that's all very important, you to have to figure when you're doing your budgeting, that your $100 ticket, your average ticket price might be $70.

That is how you do your averages and so on, and even lower on lower-priced shows. So, you know, between the direct mail campaigns that are out there and the regular—the people who buy tickets of course, are the most average targets, are the most likely targets for these. And there is a great deal done there, as I said, through various Web sites and so on.

There is a Web site now you can go to, that will list all of the discounts that are available for all the shows in New York, started by someone who used to be a producer in New York, who gave it up.

So there are—again a question of what is affordable, that is also a question mark. We're always going to be costing more money than renting a video.

However, as I watch movies creeping up in New York to $15 a seat, when not that long ago that was a high price for a theatre ticket. It's just that the price of entertainment seems to be going up.

The other part of that is, shows are getting more expensive. People want the spectacle on stage. We have a musical running this year that is like sixteen million dollars. It is a long time to make that money back, even if you're a hit. So, you know, it's part of what it is.

But again, some people think $70 is too much.

MR. VIERTEL: One of the issues involved here that is really intractable and very frustrating, is that as expensive as theatre tickets are, and they are by most peoples' standards way too expensive, producers can be accused of a lot of things except being improvident in the way they spend money in doing their shows, maybe.

Movie producers can be accused of that. We produce as cheaply as we can because the money is very hard to raise. And the likelihood of success is remote. Yet the cost of production has dramatically out-stripped the price of the ticket.

If you're looking at a mathematical problem, the ticket price is too low. No one believes you can make it any lower and get anybody to buy it. If you look at how that relationship existed, as I did myself a long time ago, a study about the musical *Anything Goes*, which was produced in 1934 originally and recouped its investment in thirteen weeks. And the musical *Into The Woods*, which I was in the process of producing in 1987, they played in similar-size theatres. *Into The Woods* ran two years, and recouped half its investment.

In that period between 1934 and 1987, inflation will drive everything up by a factor of ten. The cost of a Broadway ticket had gone up by fifteen. And the cost of producing *Into The Woods* over *Anything Goes* had gone up by eighty-four. So there was no way to make the two numbers meet. And it's a very frustrating problem. I don't know how to solve that problem.

MS. GALLIN: A lot of things we're dealing with are union. So there is no flexibility. And Broadway is also star-driven. So we're paying large star salaries too.

MR. VIERTEL: We're putting a lot more on the table in an attempt to compete with movies.

MR. WREGHITT: Recently I was going to go to a concert at Madison Square Garden. And I had seen this performer when I worked at Disney. I paid $35 for the best seat in her tour.

And when I called my friends at Madison Square Garden, a comparable seat was $250. She had not gotten that much better. I was flabbergasted that I had this second-row seat in Orlando, and twelve years later, the same seat was going to cost me that much more. So we opted not to see her.

AUDIENCE MEMBER: My husband has a Ph.D. in theatrical history and criticism. We have been to very few plays. And the plays that we have been to are ones we were sure would be hits.

So the concern about bringing new theatre out is for us something you don't want to take a chance on if you're going to spend that much money, because you just can't afford to throw away our entertainment budget.

The thing to consider is with the low price of DVDs and with televisions that are getting bigger and cheaper, you can get a very nice program at home by renting a DVD.

So you're running against that competition, as well. So I don't know how you're going to fix the problem of bringing new talent. And because I just read your article in here about the changing of the Broadway musical, I don't know how you're going to do that, and with the high prices, you're going to end up with only people that are the grading market.

MR. WREGHITT: As I said before, at one time the theatre was such a main part of what one did for entertainment. As there have been more options, I think the thing we constantly fight is making people feel the importance of live theatre, or that Broadway is a unique experience that they must have. I don't think that is the way it was. And it's a hard battle. And that is ongoing.

When we say that, I fully understand what you're saying, yet the shows in Las Vegas are full. And they are hundreds of dollars. The concert tours go out and Britney Spears goes out and sells out arena after arena at $250 to $300.

So people do have discretionary income they choose to spend in a lot of places. We try to get them to spend it on theatre.

AUDIENCE MEMBER: But that was something that was a hit.

MR. VIERTEL: There is another side to this, which is the not-for-profit theatre has largely replaced the commercial theatre as a generator of new artists and new works, so that if that was your interest, seeing emerging work by people, or if you're an audience member who just doesn't want to see the hits, but wants to actually engage in the world of what is happening in the arts, you can subscribe or become a member of any number of theatres in New York or across the country.

And unlike, I guess, going to the opera where you're seeing usually a series of classics reproduced, that is a very hit-and-miss world. You're going to see six plays, enjoy two of them, enjoy one of them a lot, a couple of them you're going to wish you had walked out on at intermission. That kind of operation is asking the audience to become a member of a family that is engaged in the process in the sense of finding new art that they like.

But those theatres are not-for-profit and their ticket prices are somewhat lower. And they are discount for subscriptions.

It is a world you can join. But it requires a certain amount of commitment that buying a ticket for a hit doesn't.

AUDIENCE MEMBER: Sports entertainment has been very successful, especially in New York, to get themselves stadium subsidies through threatening to move teams outside of New York and other cities.

I'm just curious from the entertainment standpoint, if the large producers have tried as well, to get on the coattails of this and lobby for subsidies. And second, why it hasn't been as successful for producers to be able to get subsidies from Bloomberg or Giuliani as sports teams have.

MS. GALLIN: After September 11th, the city was very helpful to Broadway, because we were really suffering. And they did come forward. But that was an unusual time.

MR. VIERTEL: One of the things that is crucial in answering that question, the Yankees can threaten to leave town. The Broadway theatre cannot. We don't have the same leverage as a sports team. We have certainly tried, and for the most part failed to interest people in government, in helping us in that way. And we do generate a gigantic portion of and are responsible for a gigantic portion of the tourist dollar in one way or another.

People come to New York—the number one reason is to see a Broadway show.

But we're stuck with the fact that Broadway is Broadway. And you can't pick up and move it to New Jersey, I don't think.

AUDIENCE MEMBER: The fees for Ticketron have been so astronomical. And I would think that is a deterrent for some people to go to the theatre knowing that their money is going for such a high percentage to this organization.

I was wondering where those fees are going specifically, how that whole contract was negotiated, if anyone knows, and are there any changes in the forefront.

MR. VIERTEL: I don't have a direct answer. I completely sympathize with the question. I think the cost of purchasing a ticket is ridiculous. I think it's driven, too. Some Broadway theatre tickets are sold by two companies basically. If you buy them online or on the telephone, TicketMaster and Telecharge. TicketMaster, which handles the Nederlander theatres, is a gigantic company that basically functions selling sports and large arena entertainment tickets.

Telecharge is a company that is owned by the Shubert organization and basically sells theatre tickets for Jujamcyn and Shubert. I think they are predicated on TicketMaster's fees, because TicketMaster set the standard for that. And I'm sure people at Telecharge figure, TicketMaster can get $8 a ticket, we can get $8 a ticket.

That money goes to run a for-profit company that is in the ticket-selling business. I think it's an extremely customer unfriendly approach to market tickets. But it exists.

AUDIENCE MEMBER: I wonder if one or more of you can give us your thoughts on the current economics of producing on the road.

MR. ELLIS: I can tell you this. It's generally like a rule of thumb, if you're going to take a show from New York and put it on the road, even if the show is losing money in New York, keep it running. And the show off-Broadway and the show that is on the road will do better.

AUDIENCE MEMBER: How are corporate sponsorships viewed by producers? In the music industry in the early '80s corporate sponsors started sponsoring tours once tours were more than just promotional tickets for albums. I mean they seem to be somewhat understated in *Playbills*.

MR. WREGHITT: Part of that challenge is if you're in a Broadway house, a lot of people if they are going to give you money, they want some sort of presence in the theatre. You're not allowed to put logos on the front of the *Playbill*, of any kind. That is why Disney doesn't use *Playbill*. You can't hang posters because there are agreements with theatre owners and *Playbill* as to what goes on at the theatre.

Having said that, right now with *Little Women* we have a $2 million sponsorship proposal with a major corporation that has made it through several levels. And we're actually meeting with the president of this company within the next month. If it works, it would be great.

It's $2 million that we can use, and an affiliation with a major corporation, that would be greater for us and for them as well. So I mean, sure we would love it, I think. I can't imagine anybody not. But that does come with you know, strings attached.

That money isn't necessarily free. But it would be great if there were more of it. And that is part of the challenge. A lot of people say Broadway is too regional for these major corporations.

That is always a challenge I run into. I have a firm called Pro Marketing also. And we do a lot of marketing for shows that I don't produce. We have had some sponsors in the past. But of that we have been able to get, usually more are in the tri-state area.

MS. GALLIN: For me personally, I don't think it is a challenge, because I don't have trouble raising money. I don't go to people who I feel by losing $20,000 it would affect them. So, I'm basically going to a credit investor anyhow.

MR. ELLIS: There are a lot of people like myself who will not invest until they see the show. That is why they go to things like where they will have a reading, and you get an idea, do you like it? Is this something you want to be involved with? And so I think it will broaden the market here.

There are other people who once you get used to making the investment, you look at the legal papers. But I think for the average person who has not invested in the theatre, they want to know more about it. They want to see the offering statement. And they want to know. And I think that's what it's going to open the doors to. And so it's narrowing the realm of investors.

AUDIENCE MEMBER: When you speak about the average investor, if the likelihood of an investment breaking even or achieving a profit is one in twenty, as I think you indicated, what constituency of investors is there to solicit with that type of financial prospect?

MR. VIERTEL: Mad dogs and Englishmen.

MS. GALLIN: Anybody can be a producer. And there are lots of people who produce once or twice.

And so, I think those numbers are really skewed. And I would say that the question that I would ask is, you know, first of all, am I interested in investing in that particular project? But the track record of the producer, you know, we have all made money and we have all lost money on different shows. But there are a number of producers who make money more than they lose money. I have asked an investor who has invested with me in the very beginning to figure out where he is with me. He has given me always what I have asked for. He is ahead of the game. I would say that's true for Jujamcyn and Randall. There are a lot of people who produce once in a while, so that that number is skewed.

I think the track record of the producer is probably more important than anything else.

MR. WREGHITT: Along with that, you do have shows that make a lot of money. Maybe you had a couple that didn't. But if you have a couple that made a lot, the average can still be somebody who is far ahead.

I have this couple that have invested with me four times, and all four times made money, and now don't want to invest with me again because they said the law of averages are against them. They keep sending me other people. It's very funny to me that they made too much money.

MR. VIERTEL: It's just flatly skewed. I don't think the number is more than twenty. I'm sure it's closer to one in ten.

The other thing is, these large shows that throw off large profits allow small investors to invest essentially with the house money for a long period of time. If you had $10,000 invested in *The Producers*, the profits from that investment would allow to you pick off quite a few flops before you began to feel any pain whatsoever. And what you get out of it, is the reason I think most people go into this to begin with, which is, they want to be part of something. They want to be at opening night and the party. And they want to meet the stars.

If you're purely looking for an investment that is safer and more solid than the theatre, you won't have for look far.

MR. ELLIS: This isn't like buying a stock. You're making an investment to be part of something that you have a passion about. And if you don't have a passion about it, don't. You don't do it every time because you think you're going to make money. You do it many times because you want to support something that you believe in, such as *Angels in America*.

MR. WREGHITT: *As Bees and Honey* wasn't going into profit in its New York run, but within three months of closing, we were still in profit, we're still sending out checks. *Metamorphosis*, we're sending out checks today. Actually that puts us on a one hundred forty-one percent return. That ran eleven months in New York. *Three Tall Women*, which was the first show I did ten years ago, is still throwing off a check every year, not a whole lot of money, but a couple of thousand goes out to my investors. And they are very happy.

MR. ELLIS: When Randall sends out a check, the note says, "I love to send out checks." One of the exciting things about this business is something new is going to happen all the time and you're going to be involved in it. I'll tell you a story. I was invited to invest, for instance, in a show, the producer or manager who is most likely to invite you to be a guest at an opening night of another show they are working on. And that happened to my wife and when we—I don't remember what the show we invested in. But we were invited to the opening, I think it was a show called *Swing*. And I had to go to the men's room. The men's room was on the second floor. This was before the show started.

I went to the men's room. I could not get down the stairs because everybody on that staircase was looking in the lobby to see who was there, because it was opening night.

I finally made it before the curtain. But it was fun.

AUDIENCE MEMBER: How do you cope with a bad review or counter a bad review?

MR. ELLIS: Jack's brother has the solution to that. You look at a budget. And the question is where are you going to go to cut in order to come in at what you think is a reasonable figure. And there are two places where you normally cut an amount of, advertising and the reserve.

Now, there is a rule of thumb for a reserve. You have to have enough money if you have a lousy review, to keep operating for X number of weeks. That is a decision you have to make. But on advertising, if you load up on an advertising budget more than you need, regardless of the reviewer, eventually, by word of mouth, if it is a good show, the audience will build.

AUDIENCE MEMBER: Will reviewers come back for a second bite at the apple?

MR. WREGHITT: When you have cast changes, if you have been a long-running show, they come back.

MS. GALLIN: I'm being very defensive. I have to disagree with you about what you just said. I do have a play running now, *The Retreat From Moscow*, which got a bad review from Ben Brantley. And it has hurt it tremendously.

I think it's a fine play. And the word of mouth is good, but not good enough. The word of mouth is good enough. But it isn't reaching enough people, because it is a serious play. The case of a musical like *Wicked*, which got across-the-board bad reviews, is doing just fine.

So I think there are some cases. But I feel so strongly about how fine a play *The Retreat From Moscow* is, that even though the word of mouth is good, I don't think for a serious play it can ever be good enough.

Prof. Paul C. Weiler, Moderator for "Labor Relations in the Sports, Theatre and Movie Industries."

MR. WREGHITT: I agree. When we did *The Beauty Queen of Leenane*, by Martin McDonagh, *Beauty Queen* is a part of a trilogy he wrote, the other part being *A Skull of Tana Mara* and *The Lonesome West*. And so we open *The Lonesome West*, within a year of opening *Beauty Queen*. The pedigree on that after the wonderful reception *Beauty Queen* had gotten indicated that *The Lonesome West* came in ahead of the game. It didn't get a bad review in the *Times*, but not the kind of review one had hoped. And we couldn't jump-start that show to save our lives.

Anybody who came loved it. But again, I agree with Susan. We just couldn't get ahead of the game on that one. And that one had the bonus. It was continuing. The characters were mentioned. They should have responded, we thought. But we couldn't overcome it.

MR. VIERTEL: It's a very different ball game for a musical than a play, because the houses tend to be bigger in musicals and word of mouth spreads faster. It's hard to think of a play that overcame bad reviews where many musicals have done so.

MR. ELLIS: I want to thank the panel.

MR. ROSENTHAL: I would like to welcome our next panel. Professor Paul Weiler is going to take us through as the moderator of this panel. Seth Popper, one of the panelists, will be joining us shortly. I'll just turn it over to you, Professor Weiler.

PROFESSOR WEILER: It's great to be back here on Broadway. I could say that with my sports and entertainment fields, adding to my labor field, that I'm doing research by going to games and movies. And last night, I was at Broadway. I was seeing *Wicked*. I was doing research at *Wicked*. But now, I also want us to know everybody condemns us lawyers. We should know that this thing that happened actually ninety-nine years ago, a guy who was playing, he was a guy who was playing for Harvard, college football. He then made a major legal threat to the president of Harvard, and also the presidents of Yale and Princeton and Notre Dame, who were playing that game. He said that game is the most dangerous activity engaged in by youngsters in America. And actually two years before, in 1903, eighteen people died and one hundred and fifty-nine were permanently disabled playing high school and college football.

And because of something else that happened, Harvard then in December invented a new system that they sold to the infant NCAA, they created the forward pass. That is the law that created the forward pass. And that guy had the power, because that was the guy named Ted Roosevelt.

He was threatening to make it a crime to be playing football, unless the game was made safe. And definitely new infant universities like Notre Dame were happy to accept that legal invention.

Now we should also know though that not just tort law, but even more, labor law has such a major impact on the worlds of entertainment and sports. I should also mention this though, that everybody, all the newspapers and television shows as well as all of the fans, all say that one of our great guest speakers here, Don Fehr's member, Alex Rodriguez, is ruining our national pastime by making an average of $125 million a season.

Nobody criticizes that a member of a Hollywood union made $29 million from his last movie before embarking on his new career. And that was Arnold Schwarzenegger.

Nobody even dreams that not just one but all six of our great friends make $24 million a season the same year that Alex Rodriguez was making $22 million a season, and everybody says he blames labor law and maybe whatever unions for the incredible rising prices in the tickets for going to Broadway, blaming Actors Equity.

Then the players union, we all have to remember though, that the average price at which you're going to see *The Terminator* was $7. The average price for watching fans every Thursday night is zero dollars.

(l-r) Panelists for "Labor Relations in the Sports, Theatre and Movie Industries": James Murphy, Alex Rosenberg, William Moriarty, Paul C. Weiler (Moderator), Robert Manfred, Jr. and Donald Fehr.

Now, I just want to mention that there are, though, some interestingly different reactions as well by the unions. In baseball, for example, by contrast with Broadway or Hollywood, what makes in all three of these areas unique by comparison to every other union, that is part of labor law, that is that the unions basically negotiate terms with just minimum salaries. The individuals negotiate these big individual salaries. But I think also I want to get the comments on this side about what happened to Alex Rodriguez. And that is that the players union vetoed him being able to negotiate a reduction in his contract salary from $25 million to a mere $21 million, to move up from Texas to Boston. *[Editor's Note: The Annual Meeting took place prior to Rodriguez signing with the New York Yankees.]*

But the Screen Actors Guild would have never dreamed of negotiating to have Mr. Schwarzenegger reduce his *The Terminator* contract with AOL Time Warner from $30 million to $29 million. He did that in February 2002, in order to move the production of that movie from the place that he had found fantastic two years earlier, Vancouver, down back to Los Angeles, to avoid the demonstration. He then decided to run for Governor. Nobody in the Screen Actors Guild union would ever have dreamed of saying that is something we're going to block.

Now, these final remarks are some interesting issues that I want to be posing after we have the discussion as well as getting to you. I'll tell you these other things, though, about the historical relation of unionism and law in these various fields.

First of all, the Actors' Equity Association was formed on Broadway after transforming itself from an employer-created company union before World War I. Then it had that historic World War in 1919. Just after World War I, it had the strike to win that great contract on Broadway. That was the same time, though, that the infant Hollywood was beginning to make some movies, moving out from New Jersey. And the Actors' Equity sent some people out there to turn themselves into a union.

But the Motion Picture Association created what was then a totally legal company union that it called the Academy of Motion Picture Arts and Sciences. While in 1928, the Academy was successful in creating the Oscars, they were not successful in dealing with the Great Depression. And so, in 1933, Hollywood workers decided to follow Broadway's lead by forming a Screen Actors Guild. And one of the things, one of their initial members, he then became the Screen Actors Guild leader, he actually took them on the longest strike in Hollywood in history, in 1960.

He then embarked on a new career to become our President, Ronald Reagan. And then the final one is that those great successes that Broadway and Hollywood had just experienced led to the initial company union in 1947 by the New York Yankees, a Major League Baseball Players' Association, to turn itself into a union in the mid-1960s. And thus it made it possible while Willie Mays, for example, and Hank Aaron and others who were making $100,000 to $125,000 a year back then. Now, it's, you know, up to $25 million a year.

And I will give this final little-known fact I just described. There was a Harvard labor law graduate alumnus student of Archibald Cox, in labor law who was inspired then to embark on a labor relations career. And in 1966, he was then made with his partner, Marvin Miller, he was made the General Counsel of the Major League Baseball Players' Association, turning itself into a real union. That was a guy named Dick Moss. And eventually after losing the Curt Flood case, he won the arbitration case to create a free agency in baseball and all the sports, and set up starting salaries. I think you should also know, though, there was a guy who was also campaigning for the job of becoming the General Counsel of the Major League Baseball Players'

Association and when he was told by the President of the Association in January of 1967 that he lost that job to Dick Moss he embarked on a new career, going back to his original attempted career. By November 1968, he became our President, Richard Nixon.

Now I want you to just note that that is just another nice illustration of how entertainment and sports shape our lives as lawyers and fans, but also as voters.

And so with that, now I want to call on our guest speakers here to be describing some of the issues in their respective industries in baseball, in Hollywood and Broadway. And then I want to get lots of questions and discussions about the issues.

MR. FEHR: We're in, in baseball, one of those pleasant periods in which we have an agreement which still has several years to run. The current collective bargaining agreement expires in December 2006. And so, while bargaining is never too far off in baseball, it is not on the immediate horizon, at least.

Perhaps the best way to just describe for you how labor relations in professional sports in general and baseball in particular, works, is to give you some sense of it in a very brief way, what the differences are and then an indication of how the agreements are structured.

To begin with, baseball, as is all professional sports, is an industry in which jargon is thought to be understood by everyone, and usually isn't. There are the terms "free agency" or "luxury tax." We now call it a competitive balance tax in baseball, or revenue sharing or an amateur draft. Those things are thrown around publicly as if they have common and easily understood meanings, and as if they mean the same things from sport to sport. And it is not true at all.

I mean, they mean very specific things. But an indication of how different sports are viewed perhaps can be gleaned from just looking at some of those phrases.

For example, any of you that follow sports knows that at the end of a player's career or sometimes in the middle, he gets unconditionally released. That is a sports term for getting fired. We don't call it getting fired, because we have press conferences and congratulate everybody in the process.

We have a term called "free agency." While it's different from sport to sport, what in the world is it? I often ask people to try to imagine what it is by imagining what it would be in some other industry.

What do you suppose a free agent plumber is, or a free agent lawyer, or a free agent anything else? Well, what it connotes of course, is that in professional sports, the accepted practice is that individuals understand certain conditions, negotiated by their unions and management, may not be free to simply quit and look for another job, because that's what free agency entitles you to do. It entitles you under whatever conditions attached, to consider taking alternative employment, if there is anybody that wants to make you an offer.

The right to do that is what constitutes most of the bargaining history in professional sports. And it has to do with, of course, money, because the players basically believe that if they are in a position to bargain individually, since they have valuable skills and there is a competitive marketplace, then more or less, whatever the market bears, they ought to be able to negotiate.

The practice, of course, is often much different than reality. But that is the theory. And management believes with equal fervor and equal correctness, I guess, they are equally correct in this view, that if they can restrict the opportunities, that a player has to negotiate for a different job, in any number of ways, that will make that less valuable for him. That affects the size of the contract.

We also have issues just as important from the player's side and often seemingly very important on the management side too, relating to how the players are going to be apportioned among the teams; the argument being that there is something to the notion that you have to have competitive contests out there that the fans appreciate, or the industry is unlikely to attract the kind of consumer dollar that it wants to.

Well, with those two little bitty examples, or maybe even I'll throw in one more, we always take it for granted that you can trade a player from one team to another. And if any of you go back to the office this afternoon and find a note on your desk that you have been assigned to a different law firm in Syracuse that you don't know anything about, and that you can't work anywhere else except for that law firm then, you'll know something about a trade.

Having said that, those things are part of the accepted landscape within which professional sports operate. And that means what we do in bargaining is attempt to negotiate the terms and conditions under which those things happen. Management, in the context of professional sports, has very definite goals which they think will serve its interests better.

The players have very different goals than management does, for I think obvious reasons. But what that means is that the negotiated framework of our collective bargaining agreements tend not to resemble agreements in most businesses or in most industries.

Professor Weiler indicated that we just negotiate minimum salaries, then the individual players negotiate their own contracts. That is accurate, but perhaps a bit incomplete. I think it's fairer to say that what happens is this: We negotiate minimum salaries. But we also negotiate with the clubs, the structure, the framework, the conditions, under which all of those individual negotiations take place. And so that means at a certain stage in a player's career in baseball, he may not be eligible to arbitrate his salary.

Later on, he can be a free agent and negotiate with other clubs. There may be conditions if a player moves from one club to another. There may be things like luxury taxes. There may be, as we have in other sports, issues about salary caps, that regardless of what goes on, there is going to be some sort of limitation imposed by the collective bargaining treatment as to what the total expenditures can be by player, club or industry. The absolute terms are related to the industry or some other standard.

So what we're doing is negotiating, I think, a fundamentally different framework in sports. And I think so to a large extent in entertainment too, than you might find in almost all other places. And that creates a different kind of bargaining environment.

There are two other things I want to mention in that regard. The first one is that while seniority is important, it can't be and isn't the sort of be-all and end-all that it is in more traditional industrial union negotiations, for example.

And if you think about it, it's obvious why that is. Those of you that are baseball fans will follow this. But if I have been a very good player and I have hit three hundred for the last three years in a row, that they can find somebody else who is likely to hit three forty. And the fact that I hit three hundred is interesting. But I'm not nearly as valuable to that team as I was before they found this other fellow.

And therefore, if there were a rule that said, by seniority, they somehow could not improve the team, that would create all kinds of complications in baseball, complications from management, but also for the players.

And that gets into the second point, because what the principal job is of the Players' Association in a way, is to have the players consider and eventually agree among themselves on a philosophy in a series of compromises in which they want to negotiate agreements. And we then go in and negotiate with the negotiating committee of the players, those kinds of provisions.

And so, what that would mean in the context of seniority is yes, seniority has a place. And there are portions in your agreement in which it really matters.

On the other hand, for every player who says, "I'm hitting three hundred and I would ask there be some sort of rule preventing somebody else from taking my job," there are a lot of other players saying "I had the three forty. I'm entitled to it because we're not looking at a minimum job qualification." You're looking at whatever the individual club feels at the time is the best possible person to fill that job. So it's a unique and different set of circumstances.

Last comment, the reason there is so much public publicity on it is that in this country we love to hear and read about our entertainment celebrities and sports celebrities.

The unfortunate thing is the level of the press coverage is much more like *People* magazine than it is a sophisticated analysis of what goes on.

MR. MANFRED: When I began working in baseball, I came from a law firm where we did a lot of collective bargaining in more traditional industries. And I came to the work in baseball first as an outside practitioner, then as an employee with the view that bargaining in baseball was like bargaining anywhere else. It's the same statute, same laws apply, that ought to be the same. Over the time that I have been involved I have come to share your view, that there are certain unique aspects of professional sports that, rightly or wrongly, make bargaining in this industry very different. And I think the most important of those is this significance that is attached to the process of individual negotiations, as opposed to collective bargaining.

I had always been of the view and actually as an intellectual matter, remain of the view, that the board and the courts have made a mistake in sports cases, as a result of the fact that they get confused about the individual negotiations process in professional sports, because that process is something that the individual players want.

Let me give you an example. In 1994, '95, most of you will remember that baseball had a long strike, and that that strike ended really as a result of the NLRB seeking an injunction which prohibited the clubs from taking the position that they had the right to insist post-expiration on the negotiations of salaries at the collective table as opposed to individually with each of their employees.

I would say to you that outside the context of professional sports, most labor lawyers would tell you that is a very odd result. In other words, even post-expiration, the union can insist that they will not negotiate wages with you at the collective table. You must negotiate individually with each employee and even worse, you must engage in that individual negotiation outside of your lawfully established multi-employer bargaining unit.

You know, I would suggest to you that anywhere else, that result would not make a lot of sense. I think that this same sort of individual collective issue is what underlies the issue that my friend Don passed on, which was the Alex Rodriguez negotiations this past winter.

I will tell you, because I believe I'm right about the first point that I just made, I don't have a big problem with what occurred with respect to the Alex Rodriguez negotiations at one level. And that level is this: The union allows us to negotiate individually with players as a result of an explicit waiver that is contained in our collective bargaining agreement. That waiver says, we may negotiate individually, only over salary above the minimum that is established by the collective bargaining agreement. And we can stick on the back of our uniform players' contracts special covenants. There is a limit on those special covenants, however.

They must provide and the contract says, this is an actual or potential benefit to the player. That all makes sense to me, in the context of a law that generally will not allow an employer to go and negotiate individually with a union member some term or condition of employment, that is less than the standard that has been negotiated by his union.

So, you know, if you believe that in decisions like Judge Sotomayor's decision in '94, '95, that the courts ruled wrong and gave too much credence to this process of individual negotiations, I think intellectually it drives you, does what the union did with respect to Alex Rodriguez and makes sense.

They stepped in. And they said, we don't believe this provides an actual or potential benefit to the player, and that it will undermine the collective interests of the rest of the players in the bargaining unit, because this contract, which is the very top of our wage scale, has significance to the economic terms that can be negotiated by all other players.

And if in fact Mr. Rodriguez admits he is overpaid by taking less, it will ripple through the bargaining unit.

Now, having said that, that's all great as an intellectual matter, and would make great sense if in fact, the board and the courts had adopted my view of the world in '94 and '95.

I think the union does have a couple of problems with the way the Rodriguez situation went down; one substantive and one is process.

Let me talk about the substantive one first. If in fact Gary Sheffield were negotiating with the New York Yankees, and I phoned Mr. Steinbrenner and said, "George, you can't make that deal with Gary Sheffield, because if you make that deal with Gary Sheffield, it will undermine the interests of the other thirty clubs, okay?" And it may be that the interests of those thirty clubs is actually laid out in a provision in the collective bargaining agreement. If I did that, Mr. Fehr's friend and right-hand man, Mr. Wasser, would have a grievance on my desk so fast that it would make your head spin.

I would suggest to you that is precisely what the union did in the Alex Rodriguez situation. And it probably is a violation of our collective bargaining agreement.

Secondly, we had a process problem of, whatever else I agreed to in terms of the provisions in the basic agreement, this limited waiver for individual negotiations, I never agreed to a system where Gene Orza, Don Fehr or the MLBPA, by themselves got to make a judgment or were the sole authors of whether a particular contract provision provides an actual or potential benefit to the player.

And it was not a provision. It was a series of changes in the contract, some of which clearly provided benefits to the player, including additional free agency.

And so there is an arbitrator, who at the end of the day has the authority to determine whether or not that package of benefits constitutes an actual or potential benefit to the player, and that is the way the Rodriguez situation was handled, was in fact, at least from a process perspective, an improper interference with the system of individual negotiations that is created by our contract.

I think all of that brings you back to the fact that at the end of the day, our issues are unique as a result of the fact that the economics are backwards. Unlike the traditional situation in which the individual employee, the last thing he wants to do is have to stand by himself and negotiate the best deal he can with his employer. That's what every one of Don's members want.

So the economics being opposite of what they usually are creates a lot of stress, I think, on the legal framework within which most unions and employers operate.

PROFESSOR WEILER: I just add this little footnote. That is, that it was that judge's decision. I think it was an April 1st, April Fools Day of 1995, after the strike that had gone on.

MR. MANFRED: It was only two hundred thirty-two days.

PROFESSOR WEILER: The judge found there was no impasse breach of collective bargaining. And under the labor law, you have to touch that to have unilateral decisions by the employers. So that is what taught another lawyer, David Stern in the NBA, the day after their collective agreement expired on June 30, 1998, just after Kevin Garnett signed the last big salary, in basketball, on July 1st, David Stern locked him out.

Rather than take a chance on labor law with impasse law, which is another key, it is a rather controversial and complicated issue of the labor law. But now we're going to hear about the labor law and labor relations on Broadway.

MR. MORIARITY: My counterpart on the management side of this discussion is not here today. I'll do my best to not take advantage of that. I would like to talk a little bit about what the musicians' negotiations on Broadway this past year meant in terms of the past, why it happened, briefly, and what it might mean in terms of the future negotiations on Broadway, because there are this year, two major negotiations with the other two big unions on Broadway scheduled for the end of June and the beginning of August. I think it's fair to say that the issue that was of greatest import in the theatre negotiations, the so-called minimums on Broadway in the orchestras, is something that has been in effect for a great number of years, probably in fact, came out of union bylaws at some point, and was placed in the body of the contract about forty or fifty years ago, and has maintained its form over a long period of time.

That is, of the thirty or thirty-five or forty major Broadway theatres, each of them had been assigned a minimum in accordance with—it's basically with its size. That has broken down a little bit over the last twenty years.

But it was still in the main, true. That is, the smaller theatres, and there are a number of theatres of under one thousand seats on Broadway, one is as low as seven fifty or eight hundred seats, have had minimums anywhere from three musicians to fourteen or fifteen musicians. And the larger theatres, those approaching two thousand seats, have had—where musicals most often perform, had minimums of up to twenty-four, twenty-five and twenty six musicians.

Of course, whenever you have a staff minimum requirement, you have the possibility that all of those employees will not actually be engaged in work, and will be paid as part of the minimum for not doing any work. And that was what caused us the greatest political problem starting about in 1975, when there was the last musicians' strike, resulting in thirty-two days of the non-performance of shows, and ended in the slight modification of those minimums.

Since the late '60s, technology has been in the process of development that would allow electronic emulation of live musician sounds, so-called synthesizers. That technology has developed very slowly, and in some respects especially artistically, very inadequately, until just recently. And one of the things that happened between the '98 negotiations, which was when we last negotiated prior to 2003, and the 2003 negotiations, is that the technology had taken a leap forward. And several devices had been invented that could emulate the sounds of the entire orchestra.

Whether they were capable of accurate emulation or whether it was a pleasant sound that audiences might want to hear was almost beside the point, because it was at the very least, practical. That is, through the use of this technology, the producers believed and we came to believe, that is, the union came to believe, that they would be able to put the show on.

Always in the past, if the musicians had decided to withhold their services, the show would not go on. We feared that in 2003. If we withheld our services, we might not only be harming ourselves in that the show would go on, but in fact, the emulation device might prove successful, given the sounds in some of the Broadway theatres currently in existence. That fact that technological improvement, plus the occurrence of September 11, 2001, where both of these parties I think began to look at themselves in a different light, both the producers and all of the Broadway unions began to look at the relationship that existed between the employer and the employees and how that relationship needed to be handled in the future.

Those two issues or events led to the occurrences of the four-day Broadway strike among the musicians. You should know that strikes are an extremely rare occurrence on Broadway.

The 1990 strike of Actors' Equity was one of only two strikes on Broadway. The other one was in 1960, when the pension benefits were gained. The musicians have only struck twice, in 1975 and 2003. And the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, IATSE, have never struck Broadway. So the labor history on Broadway is basically a productive and a good one.

And the only issues that have caused strikes were that of great importance to both parties. The League, the employer, multi-employer group had warned us that they were coming after the minimums. They were not looking to reduce the minimums. They were looking to eliminate them. They had let us know that two years in advance. In an odd sort of ironic twist, the two parties based in almost the opposite ways in which you would expect. The union, after a great deal of discussion and year-long strategic meetings on strategic planning, decided that its best hope lay with trying to find another weapon, rather than the strike.

And the other weapon we thought of was public relations.

We mounted what turned out to be a fairly successful public relations campaign, built around an issue that had more or less been handed to us. That is, the League was going to proceed with the elimination of the minimums and had made public that position.

We were successful in identifying the elimination of the minimums with its elimination of live music. And we put together a public relations campaign based on the importance of live music and live musicians in the musical theatre experience, especially on Broadway, which we feel is the crown jewel in musical theatre, in the world.

On the other hand, the League, and I'm sorry that Seth isn't here to describe this more fully, for the first time organized its members to be, to act in a much more disciplined way throughout the negotiations, which turned out to be of extreme importance once we got out into the streets.

Always in the past, when the musicians have negotiated with the League, you're negotiating with two entities that don't always have mutual interest. You're negotiating with theatre owners and you're negotiating with producers.

They are both members of the League. And in the past, we have always been successful in posing one of those interests against the other. And the theatre owners had been the stronger party in those negotiations and we had been able to resolve issues of difficulty with the theatre owners over a period of time of time in the negotiations.

For the first time, the theatre owners and the producers did not move apart. I would say that that is probably because of the presence of two extremely large and important corporations on Broadway. First of all, Clear Channel is now on Broadway and second of all, Disney is now on Broadway.

They turned this from a very local, very personality-driven negotiations into much more of a corporate negotiation. And they held their side together much better.

(l-r) Panelists for "Labor Relations in the Sports, Theatre and Movie Industries": Paul C. Weiler (Moderator), Robert Manfred, Jr. and Donald Fehr.

On our side, the public relations campaign that we were able to wage and the lesser-known campaign of Local 802 to gain the support of the other unions on Broadway, those two things together, solidified the union's side on Broadway. And for the first time, when the musicians went out on strike on March 6th, the stagehands and, in effect, all the IATSE unions and the actors joined us on the picket line and refused to cross. And therefore, the theatre owners who had attempted to rehearse with their technological devices were unable to perform. That is the first time that had ever happened on Broadway. We had never had that kind of labor solidarity.

As a matter of fact, the unions had been fairly uncooperative in the past. I think the presence of Disney and Clear Channel unified the management side. It also unified the labor side. And after four days of strike and a night at Gracie Mansion, there were compromises made. And while the minimums were lowered, to some extent we have found that since then, the show you mentioned that you saw last night, *Wicked*, every single show that has opened on Broadway since the new contract was negotiated, has opened either at or above the old minimums. And we on the Local 802 believe that part of our live music campaign built around the Broadway theatre was targeted to empowering the orchestrators and composers and music directors to be able to negotiate successfully artistic matters with the producers. And we believe that in part, at least that is what happened.

Now, the two negotiations that are coming up this year, the Actors' Equity contract, expires in June. And the stagehands' contract expires in August.

Those two negotiations could, especially the Equity contract, be extremely difficult. Equity is fighting to have all of the road productions in contrast to Local 802's contract. It's just for the Broadway theatres. The road contract for musicians is the AFM's contract, the parent international unions contract.

Actors' Equity is an international union and therefore negotiates both those, and is trying to eliminate non-union shows on the road.

I don't know if you noticed in this morning's *Times*, but another, a smaller union on Broadway directors and choreographers, which has a fairly decent relationship with some of the non-union touring companies, has said they will not allow their members to work on a non-Equity show in a show of solidarity with Equity in the upcoming negotiations. It's an extremely difficult issue. I'll have to admit that the musicians have the best of all the worlds in this.

If the other unions support us, the show doesn't go on. If the actors go on, the show doesn't go on strike. If the stage handlers go on strike, the show doesn't go on.

We have been able to forgo this solidarity so far. It's in its earliest stages. And it will be tested at each negotiation. And there should be some interesting press over this summer as to Broadway. Thank you very much.

MR. ROSENBERG: I guess we got a lot of time to fill. I want to take a little umbrage with it. I think the topic is not only Hollywood with respect to motion pictures but also a very, very large area which we cannot ignore and which I think I want to talk about. And that is television, television being broadcast television, television being cable television, television being sports broadcast television, so we can get back to the fellows at the other ends of the table.

Originally, I had a little bit of an apology. Mona Mangan from the Writers Guild was going to be here. And we were going to get a little point/counterpoint, crossfire going, which Mona and I know how to do.

Unfortunately, she couldn't make it. Jim Murphy agreed to step in. But it's not fair for me to pick a fight with him about matters that I would like to have picked Mona about on the Writers Guild.

But I do want to make a comment about labor relations generally in motion pictures and television, to set the stage. And there are, this year in 2004, two major negotiations taking place. One is the Screen Actors Guild negotiations with the major motion picture and television producers and the networks, in which AFTRA joins in for primetime television and the Writers Guild minimum basic agreement.

Normally, the Writers Guild negotiations precede the Screen Actors Guild AFTRA negotiations. But this year they decided for a lot of reasons to move forward with the SAG AFTRA negotiations first.

Next year will be the Directors Guild Negotiations. And I believe that that or the following year will be the so-called below-the-line negotiations, with the International Alliance of Theatrical Stage Employees. Strikes are always a matter of concern. The threat of strikes are always a matter of concern, because, if you cannot be assured of your supply of strengths and performers, what you do is you start to make alternative plans for filling your production commitments. And things slowly start to grind to a halt, starting in March or April, until you wait and see what is going to happen.

If you think of above-the-line negotiations, in the above-the-line the Writers Guild, Directors Guild and the performers, the relationship between the collective bargaining process and the relationship with the performers, writers and directors bears some resemblance to what takes place in the world of sports, with some differences.

The collective bargaining agreements with the above-the-line people established certain very, very basic minimums that are going to apply and govern employment in those industries.

Everything outside of those minimums and as long as it is not in contradiction of the collective bargaining agreement, is subject to free-form negotiations that have agents, managers and lawyers all getting involved with the deal for every writer, every director, and any meaningful or significant performer.

If you look at the collective bargaining agreements, they are designed to take care of the low-level, hard-working individuals struggling to make a basic living in the industry, SAG day player, actor, the background performer, somebody who comes into work in a modest part in a motion picture for a week, directors of some basic television programming, and some staff writer that is maybe working either on television programming or television motion pictures.

The agreements were never really designed to handle problems of the highly paid people. There is actually an interesting question. If you want to go back and put things into a labor law context, a traditional labor law context, and that is whether or not, and I wish Mona were sitting here, because we could fight about this, the guilds are a proper bargaining representative for the people that they purport to represent.

Let me see if I can throw this out for discussion. I'm going to take the Writers Guild as an example. And that is, that if you look at the people who sit at the bargaining table at a Writers Guild negotiations, it is not uncommon to see on the Guild's side of the table people like John Wells and David Kelly, and the people who are actually the major producers and marketers of the television shows that you see.

They are at the bargaining table, representing the writer interest when they are involved in those negotiations. And then next week or the week before, they are sitting down and having a heavy-duty business negotiation with the Warner Brothers and the Foxs and everybody else, about what they are going to get from that major distributor, producer or engaging their company to produce a particular program or group of programs.

There seems to be some NLRA law out there that would suggest that there is a definite conflict of interest, which might at least, so long as those individuals retain either officership positions or major positions on the bargaining committee, which would tend to disqualify the Guild as a bargaining representative.

Now, it only makes sense if somebody decides to raise it. Nobody has raised it. I thought we would raise it here today, because it would be something that we could start thinking about. By the way, I deal with the WGL. I have no plans. The same question could come up in major motion pictures when you're talking about directors or producers who have a major piece of the action and also sit in at the bargaining table or hold major officer positions in the Directors Guild.

It generally does not come up as often in the Screen Actors Guild, although certainly there are major performers who also act as producers or co-producers of motion pictures. So the same issue could arise.

I also asked the basic question after repeating the mantra that Charles versus the musicians was the most wrongly decided case in the humanities world. I say what we really do have here in each case—I have to ask the antitrust question too—is clearly what the Supreme Court has at least said, are labor groups in some shape or form, and although we may have an NLRA disqualification issue, somehow I don't think we have an antitrust issue that has to be dealt with, because they are labor groups rather than employer groups.

But let's move to something else so Jim and I can have something to quibble about here. And that is, let's talk about production that takes place with respect to television and an issue which is kind of near and dear to everybody's heart. In scanning through the materials, I saw it was raised as well. And let's just talk about television sports production.

Some of it is done by the networks and the mini-network Fox. And a lot of it is done either locally or nationally in the basic cable market, or for the basic cable world.

In large measure, you find that the entities—especially on the local level, whether it be up in Boston with baseball and hockey and basketball up there or here, in New York, or down in Florida, where you have local cable providers that provide sports broadcasting to the local market—typically, they do not have the time, energy or the inclination to be responsible for locations and wrangling a crew of camera people, sound people, technical directors, and tape people to handle that kind of a show.

So what they do is they go out to third-party entities and say, you just handle it. This is what I'll pay you, up to $300 a day for X and $350 for Y. Supply the crew.

Then the people function as independent contractors engaged by this third-party crewing company. All of a sudden, there is this fantastic below-the-line union whose initials are IATS, who will embark on a national campaign to bring these freelancers into the IATS fold. And in some respects they have done a fantastic job of accomplishing it, and in others not so well.

But the questions that come up in that context, I think they are still hot questions in the labor law now, because they were twenty, thirty years ago, and probably will continue to be going into the future, which are whether or not these individuals, who today work for company X and tomorrow work for company Y, and market themselves to the freelance market, are or are not employees or to phrase it another way, is it correct that they are independent contractors and treated as independent contractors?

Obviously under the National Labor Relations Act, if they are independent contractors, they are not employees, and they have no bargaining rights. And that is the end of the story. On the other hand, if you reach the conclusion as the board seems to have done, over the past, well, we all know the board works on the basis of a pendulum. And we have the pendulum swing to the left for a period of time. And slowly it swings back to the right and back again.

A lot of law developed during the swing to the left period of the pendulum, as I would like to call it, where they have found that these individuals are employees rather than independent contractors.

You then have to move on to the second question. And that is whether or not assuming they are employees, there is any basis for the IATSE or any other union to seek to go organize these individuals to bring the local cable broadcaster into the NLRB proceeding or whether they should be limited to having their petitions against, and the bargaining unit with, the third-party contractor who actually is engaged, go and pay these individuals, and in essence determining what they are going to be paid.

Unfortunately, again the pendulum swung to the left part of the world and the *Sturgess* decision (*Garry Sturgess and Michelle E. Klass v. NLRB*), this pretty much abolished limitations on joint employer relations. In other words they say one person is a supplier employer and the other is a user employer. And without getting into a lot of analysis, they say if you, the user employer, has any control over any aspect of the employment relationship, i.e., how much money you're going to pay the contractor in total, to provide individuals, you have a little nub or kernel of things that you control. And the union is entitled under the NLRA to bargain with you about the those things which you do have the ability to control.

I think it would be hilarious if you said, "The only thing I control is a certain number of dollars. And everything else is up to the other guy. You didn't make him a party to the proceeding, so you don't have anybody to bargain with."

But it's never going there. I think that to give Jim something to fight with me about, I think you can understand that I think the appropriate approach for addressing the appropriate way for categorizing these freelance individuals is as independent contractors, and in one case we actually found that approximately thirty percent of the people in the potential bargaining unit actually had their own sub-chapter S corporations, and were thoroughly enjoying a lot of the benefits associated with being entrepreneurial, independent businessmen, including the significant tax benefits that flow from sub-chapter S organizations.

Similarly, I think that the NLRB *Sturgess* decision and the cases that came down afterwards are just then absolute failures of analysis in scholarship. It reminds me of something that appeared in the back of I think it was Professor Curry's comments. It's one thing to fall between two stools. It's one thing to take half an ass and half a camel, and ride to victory on the hybrid, which is what I think the NLRA did.

MR. MURPHY: Just a brief comment on Alex's question about the NLRB's possible issue with the above-the-line guilds. I think in practical terms that one of the reasons this has never arisen and I guess has been preempted, not in the sense that we understand as lawyers, but in practical terms, is that whether it's DGA or Writers Guild east or west, or the Major League Baseball Players' Association, or Screen Actors Guild, is that all of those guilds or unions have historically kept the loyalty of their so-called stars as long as those stars, be they a David Kelly or an Alex Rodriguez, or Sidney Pollack, or a Tom Cruise or Charleton Heston, as long as those are in their fold, that that issue is really a moot point that is not going to arise.

On getting to the sports broadcasting, which was kind of a hot issue right now, I guess it could fall under the topic that no good deed goes unpunished.

For years in broadcast television the employers and their counsel have complained that the technical unions have dug in their heels, that they were an impediment to the introduction of technological change, that they were tied into a tougher, with a single employer, single-employer benefit plan and everything that went along with that.

Well, it is not my job. I don't do it. With the idea—see, historically, it is set up as more of a freelance union without ties to a particular employer, so that with the explosion of cable television and even from the networks and spin-offs of the networks of live television, sports broadcasting does place more reliance upon freelance workers. And freelance workers generally, you would think, are the dream of the old-line network broadcasters, in the sense that they are generally ahead of the curve when it comes to technology, aren't looking to dig in their heels to resist it.

In fact, they go out and make sure that they adopt it, that they are trained for it, because it means they are much more employable, that rather than trying to limit the scope of work they do, they instead are on and are looking to snatch up everything and anything that comes along, but at the same time, don't feel they have a particular interest with a particular employer. Rather, it is with the industry within that it's with the union. So the multi-employer benefit funds that provide for or constitute the benefit coverage among different employers. For instance, literally, you have members of the unions that will have a half dozen to two to three dozen employers in one single year. So they can couple together the benefit contributions in order to maintain their pension credits, investing in order to maintain health coverage.

You think that would be something that the lawyers in this industry would look upon with some pleasure. Instead we get that well, first of all, they are not our employees even though we dictate to the so-called labor contractor or the crewing corporation, that the terms of what they are going to be paid for these people, they are independent contractors. Well, Labor Board, if you don't buy that, then half of them are supervisors, because they have people underneath them. And then if you don't buy that, well, then, we will see.

I think this is part of—and maybe it's kind of beyond the scope of our discussions here, but that this is part of I guess the overall "Wal-Marting" of the U.S. labor force.

It's sort of a race to the bottom. With this, let me just offer as kind of an alternative, because I think there are choices here and I think certain employers and their counsel are making choices that maybe make a little more sense.

Recently, the IATSE was involved in organizing people who are engaged in broadcast, in doing conferencing, satellite uplink broadcasting of video, audio-video conferencing, everything to do with legitimate theatre, as well as television.

The employer there could have taken the position, a major financial services company employer, could have taken the position that well, maybe there is not a community of interest between the people doing the live stuff and the people doing the broadcasting issues, about whether or not these people are independent contractors.

They sort of did away with that because they were afraid of the IRS and stopped 1099-ing people years ago, and instead, went with—they had to pay them, W2 them.

But a number of issues, instead of doing that, they looked to develop a relationship with the union, understanding from previous encounters that as the union was an excellent source of highly trained and technically competent people, it took it upon itself that if there was a problem with employees that they have ways with dealing with that and in effect disciplining their own representative employees and members who were not performing up to professional standards. And so we ended up stipulating to an election, then negotiating a contract that we feel that everybody was a winner.

Subsequently the same union finds in another major financial services company, it's an international company headquartered here in New York, people are doing similar types of functions with live conference center stuff, as well as simultaneous computer type of streaming that then goes, essentially I guess you would call narrowband or maybe broadband telecasting throughout the entire company of users of it.

There was a supplier of labor there. The employer's first response was they are not our employees. They are employees of the other service. We saw the other service being an entertainment industry type of payroll arrangement.

Clearer heads prevailed. We then got together, stipulated to joint employer, and are now actually—I was counting this morning, I don't know what the results are. But I presume we won the last two elections by shut-outs. We will be representing those employees and then sitting down and negotiating a collective bargaining agreement.

So, with the employer understanding that the union will provide it in the future a ready source of people, as I said, who are highly qualified, highly motivated and with the sorts of issues that the network complained about for years, not being in plays.

PROFESSOR WEILER: Our last speaker is able to be here to tell the other side about the how labor laws help influence labor relations.

MR. POPPER: Seth Popper, Director of Labor Relations for the League of American Theatres and Producers. I apologize for being a little late. We actually had a previously scheduled caucus for major negotiations in the industry, which contract is expiring six months from this week, the Actors' Equity negotiations.

We can talk a little about that a little later. I think I was asked to come and talk about our last major negotiations, our local musicians' negotiations.

I think I would like to start off by talking a little bit about the League, and what it is, and how it might differ from other leagues you heard about already today, and how it differs from multi-employer bargaining units generally.

There is an old saying. Trying to get consensus in a multi-employer bargaining unit is like herding cats. I'm sure you have all heard that. I have a new saying for the League for the theatre industry. The League is a multi-employer bargaining unit which, when it was going to reach consensus, is like herding cats on acid. I say that with some substance. The traditional multi-employer bargaining unit incorporates entities or organizations basically in the same business. They are competitors and they may have different levels of weight within that multi-employer bargaining unit. But they are generally competitors.

We have three different levels of competitors. And they are all in business with each other and they are all business partners competing with each other for the same business between each other. We have producers. We have theatre owners. And we have around the country presenters. We don't represent presenters around the country, people who present theatre in markets like Chicago and Boston. We don't represent each of them for the purpose of multi-employer bargaining. But we do represent them as members of our association, which gives them perspective on what we do here in New York and for touring theatres especially. And producers are in business with theatre owners. And theatre owners are in business with producers. And producers book shows at their local presenting halls around the country. So that is why the tensions that normally exist in a multi-employer bargaining unit are, I would say, exacerbated significantly in our multi-employer.

Reaching consensus historically has been, I wouldn't say an impossibility, I'll label it an improbability. And that is what we really turned around in this last negotiation. That is where the League has advanced itself in the last, I would say two to three years. But it's a process that started a while ago. Historically, it just—you understand the background. Historically the labor relations were centralized. Control was centralized with the Shubert organization in basically a controlled labor relations policy. Some inherent problems with that, the Shubert organization, the theatre owners don't pick up any costs with employees. If I'm controlling labor relations, why would I take positions that would lead me to a work stoppage if I'm going to lose revenue when I'm not assuming any of those costs? That is a cynical look at it. They were probably better at discussing that as the perspective of the producing world that I represent.

Again, you're seeing some of these tensions coming about as I'm describing them. Producers also have an inherent incentive not to take on a position that leads to a work stoppage. They have been working for five, six seven years. Some of you heard about the developmental process trying to get a show to Broadway. And they look to me or somebody in my position and say, "You mean to tell me, my show is going to go dark now after I have been doing that for six or seven years and invested my time, energy and money," and in these days a significant amount of money in putting a show up, tens of millions of dollars to get shows on Broadway.

So there is an inherent incentive, more than many other industries engaging in positions that lead to work stoppage.

That changed fifteen years ago. Producers started to get more involved. And in the last two or three years because there is just so far you can raise ticket prices to accommodate labor costs, folks basically said to us, you have to start taking care of some of the abuses in this industry. I don't generate the policy, I just administer it and seek to effectuate it with the house hiring minimums in the Local 802 arena. That is where this started. It started the strategy, in this case planning started about a year prior. The contract expired the first week of March 2003. Strategic planning really started a year, year and a half prior, and was basically put into place, I would say communicated to the membership during the summer prior to.

Now I assume Bill gave you background on house minimums and how they work, and where they come from. Our goal in the negotiations was never to get rid of minimums. That is not an achievable goal unless you completely break the union. You're basically eliminating the reason for the union to be in existence, at least this union, if there were to be no minimums in our contract. And that was not the goal of the negotiations. The goal of the negotiations was to put a significant dent in it.

And the reason why we wanted to do so, the first reason is obvious. Economic minimums in certain circumstances create a featherbed-type of atmosphere. There were ways of people getting around it for the last ten years. But basically, that is the perspective that people brought to the issue of "Tell me I have to hire twenty-four, twenty-five, twenty-six people for my show. I don't want to do that or my creative staff doesn't want to do that." That creates hiring where you don't want and economic costs where you don't want to absorb them.

That is an easy analysis. I didn't really draw out this negotiation. Producers produce and you heard a little about it this morning. Producing is about making choices, deciding what is the right balance between art and finance, how much art can be put on the stage for X million dollars. I'm investing in this show and choices with scenic design, with directors, and scenic design centers, lighting design, how many instruments are on stage, costumes, how many actors are on stage.

There is no end to how many people the director wants on stage. They want every show to look like *42nd Street*. Somebody has to hold the line. That is the job of the producer in producing the show.

The only place they couldn't make those decisions was with the music. They couldn't have discussions with the composers about how many musicians were in the pits. That was made by the contract. That inhibited their ability to do what they are paid to do. They throw $10 million at a show. And they want to make those decisions. It's their money. But what really drove their analysis is the emotional aspects of this: why should anybody tell me how many musicians I should hire?

There are other rationalities, such as, "Why should I need to have sixteen? I need to have twenty-six in the Broadway theatre, because there are different minimums in different houses." Why should the real estate determine what the art is? I think from everybody's—from an objective position, that's what drove their thinking. And that is what drove the strategic planning for this.

We knew this was going to be a negotiation that was going to be ideological. If it was just economics it might have been easier. The union and its members, which I learned in these negotiations feel incredibly strongly that minimum numbers are not only appropriate from an economic and artistic perspective, but the nature of the music played on Broadway and the size of the individual component orchestra sets in an orchestra, you need X number of horns, X number of violins, to make up the Broadway sound. That is an inherent belief system within Local 802, as I understand it. And I accept that. That is an ideological position. Ours was ideological about what producers do that makes for tough negotiations.

This was not about money. At the end of the day, this was really not about money. So we knew this was going to be a tough sell. We knew we needed the support of our own members internally. We knew we needed the support of other unions because our strategic plan was to be able to play through any potential work stoppage. We came up with that plan. It was the only way we saw that we could prevent a work stoppage. The only way we thought we can make attempted minimums was without a work stoppage, was to convince the member union and its membership we were able to play without them, that we could reach an accepted negotiated settlement, if they believed we were ready to go forward without them.

So the goal was not to create a work stoppage and play out musicians. That was never the goal. We believe live music should be on Broadway and we continue to put live music on Broadway. We hire more musicians than we need sometimes. The goal was to be able to make those decisions on our own, without interference. And the only way to do that without a work stoppage was to take this stuff on and be able to play through. We communicated with the unions what the goal was.

Our selling pitch was very simple. We're trying—we want to keep you employed. We want to be able to make decisions involving shows and may actually create more employment for you.

If we don't have to hire those musicians maybe we hire those six extra actors or we put one extra scenic element in, which requires one other person on the stage. It seemed like a pretty easy sell for us. And we got, trust me, we got assurances from the unions we deal with, other than Local 802, that this would not be a problem before we took this position on.

But of course as you probably know, having heard from Bill that two of our unions honored the picket line. But I think the real achievement the Local reached was not necessarily at the table. We got a great deal at the end of the day, negotiated settlement four days after the strike hit.

The real achievement was Friday night, when we were told the unions would not cross, would honor the picket line. At that moment we planned to play through. And we expected the unions to cross. We were shutting down and we were shutting down for the weekend and for the foreseeable future. And that was communicated directly to Local 802. And the other unions honored the picket line. I think that is a moment in the industry that I work in. I think it serves this industry well going forward.

We have a major negotiation going forward with Actors' Equity. And we're more committed and more resolved to doing what it needs to do economically than it ever has been in the past. All the tensions that I described to you early on came to a head that Friday night, when we made our last best offer to the union and said, "We're done."

That has never happened in this industry as far as I know, at least not in my lifetime, maybe. So, four days later after the strike, the city stepped in and helped negotiate an agreement. We were all comfortable with the agreement we reached. And I believe the dynamic on Broadway has shifted. And I think that's what encouraged the union. I know Bill was a major proponent of this, to form some—a bit more of a solid front with the creation of the coalition of Broadway unions and guilds, effectually named COPA. In fact, yesterday, the SSD&C, Society of Stage Directors and Choreographers, announced they had formed an agreement in connection with the issues they were facing with Equity.

I know they would like to attribute it to the corporate giants crawling into the theatre business. That is absolutely true. The corporate interests have obviously forced the industry to look at its labor relations a little differently. And I think that helped move the ball forward, as we say.

But I think you met a bunch of people this morning, I guess Susan was here and other producers, it's still inherently a mom-and-pop kind of business, believe it or not.

It's still people who want to put on a show. They have to just get $10 million to do it as opposed to what it was in the '50s. But it's still people who have friends who know people who have money, discretionary income; businesses that want to invest in Broadway. And it's those people who are really driving in many respects, the decisions being made by the League. So while the corporate interests have been involved, in part, in other words with Disney and an organization called Clear Channel, it still is those individuals who are on the line day after day, producers of *Rent* and *Avenue Q*, and *La Boheme* and *The Producers*. All those shows are individuals. There is some corporate money in there behind it.

But they are individual people taking individual risks involving those kinds of things. It's a scary business to be in if you don't get control of your costs. That's what the future holds for our business.

PROFESSOR WEILER: We had some great, great lectures now. And I just want to mention two other issues. First of all, is there any prospect now of a true alliance between the Screen Actors Guild and AFTRA? Are they ever going to be unionizing? The other one was something that was also an identical feature for Broadway, Hollywood and sports, which is, there is not just collective bargaining between the union and the employers, but also the individual contracts that are negotiated always by agents, and the agents are now beginning with Actors' Equity, and then expanding to the Screen Actors Guild, and then to the Baseball Players' Association, are all regulated by the unions. But Actors' Equity was the first one to put a cap on how much the agent can be making from his client. And then the Screen Actors Guild called that. And then Actors' Equity survived an antitrust challenge, won that case in the Supreme Court in 1980, saying there was a labor exemption for that. And the National Football League Players Association and NBA and NHL Player's Association all regulated.

But the one party that has not regulated the amount of money that the agents can make from the players is the baseball player's union. That union doesn't want any cap on how much the player like Alex Rodriguez is making. I want to get some sense also, about the justification, though in the apparently free market, between the players or the performers or the writers and their agents, why the union is putting a cap on what percentage they can take out of the salaries.

MR. ROSENBERG: Let me address one of the questions. Whether or not a marriage between SAG and AFTRA is not or is in the offing, the first time it happened, it was voted down. I was very surprised that after having been jilted at the altar, that AFTRA decided to pursue getting together again. Ironically, AFTRA had—both unions had to pass it by a sixty percent vote in order for it to carry. I believe that approximately seventy-five percent of the people in AFTRA voted in favor of it. And the Screen Actors Guild, it was fifty-eight or fifty-nine percent. It just missed it.

From the discussions that I have had with people at SAG and AFTRA, and that happens three, four times a week that we talk to them, the statement that I'm hearing is that when you have a clear majority of membership of both organizations that were in favor of putting the two organizations together, it's ultimately something that has to happen and it makes absolute sense from a trade union perspective, from a management perspective, and producer's perspective, it has got to be a nightmare, because you eliminated the flexibility that came in existence with these two guilds competing for work, especially when it is not on film. SAG has its own internal issues that still have to be worked out, which I think until they solve those, are not going to lead to another vote.

There are factions within SAG, I think, I understand, that are opposed to this. And until these dissidents can somehow get the venom out of their system, they are not going to put it out for another vote.

With respect to the agents question, this is more over on the union side. Interestingly enough, both SAG and AFTRA had some very serious negotiations with the agents' association out in Hollywood. And ultimately AFTRA and that organization were able to put together a new franchised agent's agreement. I think it did about a year ago. It still contains, as I understand it, the ten percent cap on the agents' commissions.

Managers' fees are not regulated because managers are individually hired to manage the affairs of somebody in the industry, rather than their representing you.

Unfortunately as I understand it, the Screen Actors Guild and the talent agents' group have not yet been able to put together a new franchise agreement. Things fell apart. It was all part and parcel of the dissident's movement within the Screen Actors Guild and a new franchise agreement is not in place.

I believe the old one is terminated, although correct me if I'm wrong. As a practical matter they are kind of operating within the framework of the cancelled expired agreement and it's still ten percent.

The big fight was the extent to which the agencies, aside from the packaging activities that they have been engaged in, can take a position as a business organization in some of the projects that they were involved with, and how to protect people that they represented as talents from the potential or the real conflict of interest that comes from the agency now serving two masters; one the people it represents and two, its bottom line.

Again, I think we have to recognize that there are significant differences between the people in the entertainment industry that the Guild seeks to protect on the one hand, and the players that you have in professional sports.

Everybody in professional sports, from an economic perspective, is a star of one form or another because of the numbers that are attached. Whereas SAG and the DGA, and Writers Guild are not just protecting the star, they are protecting the journeyman worker who really needs that agent to just get a job, and would probably sign away twenty or thirty percent of his income to the agent, if there were not some restriction on it. So the guilds are protecting a different level of individual by their franchise agreements than take place in sports.

And I think that may be an explanation of why you have free agency with agents in sports. And you don't have it in the motion picture industry.

MR. FEHR: Just briefly. Some of the other sports unions do have more stringent limitations on what an agent can earn.

But there are some fairly significant legal questions as to what the union can regulate. For example, there is no doubt that you can regulate if you wanted to set a fee that an agent could charge for representing an individual in negotiations for an employment contract.

But if he is also doing his taxes and purchasing his insurance, paying his bills, arranging for a house, representing on an unrelated legal matter, there is a fundamental question as to whether or not the union has any jurisdiction as to regulate that at all.

There is also a political question we have, which is whether or not the members believe that we have any business knowing, much less regulating, what they do in those other areas.

The players have views on that all over the lot. Obviously we could not take a strong position without a heavily lopsided majority support. Without that in the union and from our standpoint, I hear numbers like fifty-eight and sixty percent. And I know sort of academically, those are good majorities. And from my days back in Kansas City in more traditional unions, I know they did that. If we don't get well over ninety percent in favor of whatever proposition we're advancing, unions have—we have all done our job wrong. We have not managed to forgo that internal consensus.

We have other problems with agents in addition to fees, the fee portion being sometimes very difficult to evaluate qualitatively, what the work is worth. And if it is mixed up with fees for other services, how do you regulate it, anyway?

But in our business, at the moment, the agents have a lot of problems with one another. They think they are stealing their clients in a virtually unlimited assortment of unsavory ways.

And they want us to do something about that, which we would like to do. But that poses an interesting problem, because the witnesses that would participate in this process, whether it would end up in court proceedings under contract or arbitration proceedings under a system we set up are of course the players whose primary interest is not to get involved in these messy proceedings. And we represent the players. So it's a very difficult problem.

We're now, for the first time in probably about twenty years, about to undergo a thorough review of the entire relationship between agents and our certification regulation program. And I don't know what is going to come out of that. But we're sort of going back and examining it from first principles.

We don't have or did not historically have difficulty with some of the conflict issues that were just discussed. But we may be beginning to have those difficulties. Just to give you a hypothetical example, you know an individual agent may want to get involved in an ancillary business utilizing the celebrity value of players he represents in television or theatrical or film productions.

Those may well interfere with the playing obligations of the contract. There may be significant restrictions on the freedom of an individual to do some of those things as a result of the collective bargaining agreement. And it then puts them in precisely the situation that was previously described, which is, they want to represent you for one purpose, and have a fiduciary obligation, but be effectively negotiating against you in another context. And it becomes very dicey.

We will be looking at those things. I don't think we're likely to have the kind of problems that were described by the previous speaker, at least yet, because I don't think the overlapping business relationships are there. But they are beginning to surface.

MR. WEILER: Let's spend the rest of our time here before we go for lunch, having some questions and comments.

AUDIENCE MEMBER: My question was specifically about, I do criminal law now. But I wanted to get into sports law. So my question was, as I start to read some of the books out there on sports agents and on sports law, it seems like there seems to be this dicey issue about how would you get a client and how agents somehow are supposed to be above-board.

But I guess an example is if you're looking for a client, the client is saying, "How much are you going to pay my family to do X, Y, and Z. If you take care of them, then I'll let you be my agent," and trying to find out, how does one that's trying to start out in this industry, what is the proper way to go about it?

MR. FEHR: The problem with wanting to be a sports agent, particularly in the team sports, is there aren't very many slots, relative to the number of people who want to get involved in it. That is first.

Secondly, the competition is in many cases cut-throat. And third, there is this notion, if you learn how to represent a person, you can sort of go and represent athletes, the problem being that negotiations in football, and baseball, and basketball, and hockey, while they have some similarities, have some very significant differences.

And that doesn't even touch the individual sports or non-employment relationship aspects of it.

The best I can recommend is that the first place you go to are to the four unions and get a copy of their agent certifications and regulations provisions, and read them, ask questions, talk to people, look at the collective bargaining agreements and while you're doing it, make sure you understand all the rules that may affect college eligibility of somebody that you may want to represent.

And then it comes down to, unfortunately, persuading the first client or clients to give you an opportunity, and then doing a good job for them.

And that is an individual type thing, not individual to the agent, but to the player, more or less.

Nobody is going to pretend there aren't people telling you to do things you shouldn't do.

If the unions find out about it, they will attempt to do something about it. The NCAA certainly will, if that is the case. It's a difficult process.

MR. MANFRED: The one thing about our sport, which I know the most about is, it's a long-term proposition in terms of building an agent's practice. Most who have been successful in recent years begin with our amateur draft choices.

They find a way to forge a relationship with a player that would be selected at a fairly high level in the amateur draft. The problem with that is that in baseball, the pay-off in that can be a long-term proposition in the sense that often that player will play three or five years in the minor leagues before he gets to major league baseball.

And while he may make some money as a result of his selection in the amateur draft, your reputation won't begin to grow until you start to have negotiations with a real major league player.

AUDIENCE MEMBER: This is a topic that probably wasn't raised today. But it's addressed to Bill Moriarity with regard to the union.

The economics obviously drives a lot of the decisions of the union and the producer. What is the position of the union with respect to music downloading? Is that going to be dealt with as a new use as far as union payments are concerned or is it still considered part of the original recording?

MR. MORIARITY: Certainly that is the direction in which it's going. And I think that there are ongoing talks almost as we speak. There were talks this past week in Los Angeles about the trademark name. And we're trying to craft something that is fair for both the featured performers on the one hand and for the non-featured performers of whom there are far more.

There are a far greater number. And yes, it's a basic amount based on a licensing fee. And that is what is trying to be worked out. It has not been worked out yet. And there is still a lot of discussion internally, both within the union as there is within the industry, about how this is going to happen. But I believe that at the end of the road, if such a deal has to be made, because I don't think you're going to stop this stuff, I mean I think the barn door is closed. The horse is out.

AUDIENCE MEMBER: What is going to happen with existing recordings? Are new rates going to be applied?

MR. MORIARITY: I think there will be a cut-off from years past. But yes, existing recordings will be addressed in some way and new recordings will be addressed in a similar way.

And I think the attitude of the musician's union also is, this should not be a complex calculation.

AUDIENCE MEMBER: I had a two-part question on drug testing specifically for Mr. Fehr and Mr. Manfred. I was curious if the rate of players who are using performance-enhancing drugs is actually around or below 10 percent— isn't there more movement in favor of the silent majority of players whose salaries are probably being decreased to their detriment or aren't having one of the seven hundred slots in the major league roster, while a few players' performances are enhanced and salaries increased, based on the use of substances?

Mr. Manfred, how could the players take seriously the argument that drug testing is in their own best welfare when the arguments are being launched by Commissioner Selig, who was involved in collusion in the past and continues to accept responsibility for those behaviors and probably isn't well trusted by the players or the Players' Association?

MR. FEHR: Let me first perhaps remind everybody of a gratuitous aside I made in my initial remarks about paying too much attention to publications and basing information on it.

I think I referred to a lot of the stuff as "*People* magazine stuff." When I hear a question like that, I think a lot of the impressions tend to come from that.

Let me explain to you what our philosophy has been. It's a pretty simple one. And it is one which is premised on negotiations which you may think don't relate directly to the questions you have asked.

It's pretty simple. Players' views have always been that if you're going to test an individual for some wrongdoing, before you do that, you ought to have some reason to believe that that individual, as an individual, did something wrong.

And we understand the Fourth Amendment doesn't apply. But the principles are involved. Also, you have basic notions of privacy.

And so, the testing agreements and understandings we had up until very recently preceded in large part from that basis and on a basis of getting appropriate medical attention to people when needed.

And performance-enhancing issues raise different questions than cocaine does, for example. And you know there are ideas which—or problems which come to the floor at certain times and which don't come to the floor at other times.

In the spring and summer of 2002, the players debated among themselves in meetings related to collective bargaining, a question that might be phrased as, to what extent does the current situation with respect to alleged unlawful use of Schedule Three steroids, should that modify the positions that we have previously taken, remembering of course that you know these baseball players aren't driving buses and flying airplanes or operating heavy machinery or running the risk of being dangerous to other people.

And the conclusion they came to was to see if we could negotiate an agreement with the clubs, which said that we will have a year of what we called anonymous testing. And if the results of that indicate that there is a significant problem, defined in a certain way, five percent of the tests I think, then, we would switch to identified testing, which would come into effect this year.

And you would continue on identified testing until the incident level dropped to the point where it didn't reach that threshold. Again, it has to be under two and a half percent, if memory serves, for a couple of years, for that to be the case.

This is sort of a long-winded answer. The reason I put it that way is that from the player's perspective, the issue that gets lost is privacy. And that is something that tends to matter a lot.

One thing before I turn it over to Rob. It's unfair, I think, to suggest in the context of the negotiations that we had the last couple of years, that somehow Commissioner Selig was alone in pushing an issue around, which he couldn't be trusted, based on prior behavior and economic circumstances.

A steroid issue was an issue that arose and had to be dealt with. I spent time in Washington in the summer of 2002, enough to make that clear. And under the labor law, as you know, you have grievances, disputes, and arguments. But it's a marriage under which you can't have a divorce. And therefore, you find agreements with the people. And the saving grace is, you make agreements. And if one side or another believes another one has violated, you enforce those agreements.

MR. MANFRED: It's unusual when Don says something, I find myself in the position of wanting to be a little more pointed. But in case you missed the significance of his remark about *People* magazine, when you ask a question like that, you ought to know a little bit more about the facts.

First of all, all the events that took place during the conclusion took place when Peter Uberroth was Commissioner. If you take the time to read the three collusion decisions, there is not one word in those three decisions that suggests that Commissioner Selig had anymore responsibility for what went on with respect to the collusion in those years than any one of the other thirty owners. Certainly culpable to the extent there was a finding against all thirty, but no more than anyone else.

The issue about, you know, who has admitted what and whatnot, with respect to collusion, I think it's important to understand that the last point that Don made, there was a lot of legal advice given prior to the time I was around, about what was and was not appropriate under that collective bargaining agreement.

Sometimes people are wrong. And to turn those issues into issues of an individual's credibility or integrity is probably a mistake.

All of us, you know, that are involved in these relationships over a period of time, come to realize that you have to deal with, while trust and personal relationships are important, you have to deal with particular issues like steroids, on their merits.

When we came to the table on the issue of steroids, we came as a representative of the thirty clubs. The negotiations over performance-enhanced substances, frankly, was different this time around than it had ever been in the past, because it had become a fan issue.

It had become an issue that was not relevant to any individual's personal integrity, but to the integrity of the game.

And I think that we were able to forge an agreement that did balance a set of interests that are very different on both sides.

And you know, while the agreement is not perfect, I think that the union made a real step forward. We made a real step forward in trying to address the issue, and you know, we will see how that issue plays out this year. As Don alluded to, it's the first time we will have identified testing and we're hopeful that that program will alleviate at least the perception problem that we have, and help us get to the point that we're more of a zero-tolerance industry.

AUDIENCE MEMBER: Given that strikes are detrimental to the game of baseball, it's somewhat curious that a collective bargaining agreement would expire in the middle of the season. Isn't it better to play out the season in its entirety?

MR. MANFRED: Why do you say middle of the season?

AUDIENCE MEMBER: Did we not lose the World Series in '94?

MR. MANFRED: The agreement actually expired in December of 1992. We negotiated long after expiration in an attempt to get an agreement. We have never, you know, we fooled around with expiration dates. But all of the relevant possibilities were outside the season.

Every one we have ever had was outside the season. The problem has been even with that outside the season agreement, getting a successor done.

MR. FEHR: At the risk of reminding everybody of the most elementary fact about private sector labor relations, you negotiate in good faith. You either reach a deal or you don't. If you don't reach a deal, people have to consider whether or not to resort to economic coercion of some sort to try to get one done.

If we go on strike November 12th, I doubt Rob is going to care a lot. That's what it comes down to. Similarly, if they lock us out December 16th, my guys don't lose any salary until April 15th. They appreciate they are not the pressure point, that the purpose of a strike or lockout is. That begs the question as to whether the fundamental system we have is the best way. But as long as we have that one, you'll see the pressure point applied by both sides when they might have some effect, not when they know they won't have any effect.

PROFESSOR WEILER: I think we're supposed to be breaking now. I just want to make one final comment and maybe get you to express your views about this. This is about what is the appropriate treatment of Pete Rose.

I want to remind you though, that I had written about this in one of my books, and I definitely have always thought, after investigating the documents that Bud Selig was relying on and his predecessors, he was definitely doing what he finally confessed to doing, betting on his teams to win the games.

I want you to know there are already two Hall of Famers who did that and one future Hall of Famer who did exactly that. And they were both suspended or fined, not banned from sports for life.

And one of them is a guy named Paul Hornung, who was on the team that won the first-ever Super Bowl. Another guy is Charles Barkley.

So I want you to know about that. You never read about that in the *New York Times* or *USA Today*, two of my favorite newspapers. And maybe you can form your views about that. I'm talking to both Rob and Don about that at lunch. But now we have to end.

I want to thank the people here for organizing this and inviting me here to be educated by the great guest speakers we have had.

'Til Death Do Us Part?: New York's Failure to Grant Deceased Celebrities a Right of Publicity

By Adam Zia

Introduction

"The prominence of the star role has been one of the most defining features of American culture as distinct from other cultures."[1]

Fame and celebrity have now become an integral part of America's popular culture. Television, film, music, and even now "reality show" celebrities have become, for better or worse, of great interest to the American public.

In much the same way as our fascination with fame has triggered controversy among scholars of our culture, the right of publicity has engendered controversy within the legal profession.[2] The right of publicity remains one of the newest and least established forms of intellectual property in the United States. Despite two United States Supreme Court decisions and decades of case law, the current legal landscape is a confusing morass of inconsistent, sometimes non-existent, or mutually exclusive approaches, tests, standards and guidelines, with the confusion only increased by several recent rulings.[3]

Adding to the confusion regarding the right of publicity has been the specific issue of whether or not that right is descendible. Both the judiciary and the scholarly commentary in this area have been unable to resolve the operation of this doctrine in cases presenting appropriations concerning a deceased celebrity. New York, once a leader in the establishment of the right of publicity, has continually denied the descendibility of this right.[4] In doing so, New York has ignored the evolution of the common law right of publicity. Many other state courts and legislatures have acknowledged the right of publicity as a form of property right, and one that is descendible.[5] It is time that New York followed in the footsteps of these states and set out a right of publicity that is descendible.

This article sets forth to discuss the descendibility of the right of publicity and New York's misunderstanding of this right. The article will discuss the development of the right of publicity and how it has evolved out of the right of privacy. It will also discuss the notion that the right of publicity is a property right, New York's position on the descendibility of the right of publicity, as well as state law in other jurisdictions. Finally, it will provide a conclusion as to what should be the outcome of this right in New York.

Development of the Right of Publicity

The doctrine of the right of publicity has arisen out of America's interest in celebrity. Preceding the doctrine of the right of publicity, the American courts and legislatures had adopted a right of privacy, generally defined as the right to be "left alone."[6] More recently, the notion of a right of publicity has evolved from the original right of privacy. The right of publicity has developed as a separate right from that of privacy, one meant to help celebrities maintain the rights in their image.

Beginnings of the Right of Publicity

Samuel D. Warren's and Louis D. Brandeis' article "The Right to Privacy,"[7] published in the *Harvard Law Review* in 1890, set the background for the right to privacy we know today. Justices Warren and Brandeis were the first to truly articulate the notion of a right to privacy in which a person has the right to keep his personal life from being invaded.[8] Their article was written as a response to the growing presence of the news media in private matters. They defined the right of privacy as "the right to be left alone."[9] Further, they highlighted the unauthorized use of a person's name, image, or any recognizable attribute as a type of privacy violation.[10] Over the next century, this right would become a key doctrine in American civil rights. Since "The Right to Privacy" was published,[11] court cases and legal articles have attempted to clearly define what the right is. In 1977, the *Restatement (Second) of Torts* adopted four different causes of actions arising out of the right of privacy: (1) Unreasonable intrusion upon the seclusion of another, (2) appropriation of the other's name or likeness, (3) unreasonable publicity given to the other's private life and (4) publicity that unreasonably places the other in a false light before the public.[12] Yet as "celebrity" grew in America, so did the contention that the right of privacy could not give sufficient protection to one's image.

The growth of the "celebrity persona" was accelerated during the middle of the twentieth century.[13] Studies have shown the increase in biographies about celebrities and even the use of the word "celebrity" itself during this time period.[14] Due to this growth in interest, new issues arose that a right of privacy could not address. Celebrities sought ways to protect their images from unauthorized uses, but the right of privacy had been ill-equipped to handle such problems. A new right, that of publicity, began to emerge to help protect the celebrity image.

The right of publicity was first acknowledged by the courts in *Uproar Co. v. NBC.*[15] Although the court inferred that there was some form of right of publicity, it failed to articulate any rule or doctrine.[16] After *Uproar*, it was not until 1953, in *Haelan Laboratories, Inc. v. Topps Chewing*

Gum, Inc.,[17] that the Unites States Court of Appeals for the Second Circuit held that, "in addition to and independent of the traditional"[18] notion of invasion of privacy by appropriation, there also existed a "right of publicity" granting individuals protection for their personas.[19] *Haelan* involved a professional baseball player who had given the right to use his photograph on a trading card to both the plaintiff and defendant.[20] The plaintiff argued that the photograph violated its exclusive rights to the photo, while the defendant argued that the plaintiff's rights stemmed from a statutory right to privacy.[21] The court rejected the defendant's argument and further stated that "many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."[22] *Haelan's* holding that a separate right existed set the path for the modern right of publicity.[23]

As the media's infatuation with celebrity grew in the United States, discussion of this right continued. Surprisingly, though, the U.S. Supreme Court has had little to say on the subject. It first discussed the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co*.[24] Key in the Court's decision was its acknowledgment of a performer's right to the economic value of his performance as a separate right from his identification.[25] However, the Supreme Court in *Zacchini* chose not to clearly define the right of publicity. Rather, it based its decision on the specifics of that case. "This uncertainty has encouraged some lower courts to virtually ignore *Zacchini* when evaluating First Amendment defenses to right of publicity claims."[26]

The *Restatement (Third) of the Law of Unfair Competition* has provided guidelines to defining the right of publicity as "one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for the purposes of trade."[27] States also have developed, through case law and statutes, different ways of applying this definition. New York has failed to even adopt this common law right of publicity, and has solely based its right on sections 50 and 51 of the New York Civil Rights Law,[28] to be discussed below. Again, even "definitions" have been unable to halt the confusion that still surrounds this right.

Right of Publicity as a Property Right

While most states have in some way or another acknowledged a right of publicity, the classification of this right has remained unclear. In *Haelan*, the court refused to answer the question of whether the right of publicity was a "property right."[29] The hesitancy or refusal by courts to address this issue prevents clarity. The law of property allows for the descendibility of property rights. Because the courts have refused to answer the question of whether the right of publicity is a property right, they have had difficulty in deciding whether the right of publicity is descendible.

Over the last fifty years, state laws have increasingly come to treat the ability to profit from the commercialization of one's persona less as a privacy interest and more as a kind of property interest.[30] These statutes have recognized the importance of defining the right of publicity in the context of a property right, separate from the right of privacy. Doing so enables the alienability and descendibility in one's publicity right. Giving a celebrity a property right in a right of publicity, similar to an intellectual property right, has been explained as an incentive to promote future creativity, as a reward for a valuable service to the public, or as a means of preventing unjust enrichment.[31] As the Supreme Court has acknowledged, the right of publicity has a purpose of encouraging enterprise and creativity by allowing individuals to profit from their efforts.[32] This rationale makes sense in today's world of celebrity stardom, as much thought and time is put into creating celebrity persona. Celebrities hire numerous publicists, stylists and managers, among others, to help create a desired image. All this proves the necessity to offer a form of protection, a form of property right, once this image is created.

The recent case of *Hoffman v. Capital Cities/ABC, Inc.*[33] underscored the unique nature of the right of publicity. The court discussed the right as simultaneously a property right and privacy right, combining elements of both and defying classification as exclusively one or the other.[34] While referring to a magazine's publishing of a digitally altered photograph of Dustin Hoffman, the District Court held that "the celebrities were violated by technology."[35] The Court of Appeals, however, disagreed and held that the First Amendment protected the magazine's rights. Again, these decisions highlight the continuing confusion over the right of publicity's classification.[36]

The effort in constructing the celebrity persona represents an intellectual, emotional and physical effort on the part of the celebrity. The drive for success and the need for establishing a distinguishing, yet appealing personality have become especially important for those seeking the limelight. Even as confusion continues, so does the doctrine's expansion. Modern case law has now expanded the right of publicity from simply the protection of one's name and likeness to include voice, professional characteristics, style of performance, phrases, and even the evocation of a celebrity's image.[37] As this right expands, new issues have continued to arise. Privacy rights have gained increased exposure because of technological innovation and the unprecedented ability to intrude upon and appropriate a person's identity, image and private space without consent through the use of advanced technological equipment.[38] Digital imagery has now become a major issue.[39]

In order to deal with such newly arising issues, the right of publicity must be clearly defined. The most logical response, following the evolution of the right, would be to define it as a property right. While the right of publicity's roots will remain in privacy law, its growth should be constructed in property law. Defining the right of publicity as a property right would also allow states to recognize the right as one that is descendible, one that should not die upon the death of the individual.

New York and State Laws Regarding Right of Publicity

"While most scholars would agree that the right of publicity in securing one's identity from commercial exploitation is, in fact a proprietary interest, jurisdictions have been plagued by inconsistency as to whether such a right is passed on to surviving relatives."[40] Jurisdictions that have recognized a descendible right of publicity have done so solely on the basis that there is simply an intangible proprietary interest in such a right. This property interest "stems from the value of an individual's person."[41] Courts that preclude descendibility tend to do so by separating the right of publicity from the right to privacy with a short rope. Ohio, for example, has failed to recognize this right on many occasions.[42]

About thirty-six states recognize some form of right of publicity. As of early 2004, only eighteen states[43] had enacted legislation recognizing the right of publicity. No state has refused to apply a right of publicity to living persons, while only two states have refused to apply it to the deceased. Out of the eighteen states statutorily recognizing a right of publicity, only thirteen of those have statutes specifically recognizing publicity rights for deceased personalities.[44] However, these statutes are far from similar. They differ in the type of protections given to one's persona. Some states only protect a person's name and likeness. As with the general right of publicity statutes, the terms of these state statutes vary. The statute of limitations for such a claim varies from ten years to in perpetuity.[45]

New York

New York, New York. A city filled with stars, fame and fortune. Surprisingly though, a state such as New York, filled with celebrities and super-stardom, has failed to recognize a post-mortem right of publicity.[46] While New York has acknowledged a form of a right of publicity, New York state courts and statutes have failed to expand this right to the deceased.

New York's right of publicity was first narrowed by the Court of Appeals in *Stephano v. News Group Publications*.[47] In *Stephano*, a professional male model brought a claim against a magazine for publishing a picture of him modeling a "bomber jacket" for trade and advertising purposes without his consent. The Court held that while the right of publicity exists under the Civil Rights Law, "the plaintiff cannot claim an independent common-law right of publicity."[48] Further cases have upheld this decision, and have all found that New York does not recognize a common law right of publicity.[49] This line of cases shows New York's repeated renouncement of the common law right of publicity.

Since New York failed to acknowledge a common law right of publicity, its courts have continued on the path of not recognizing a descendible right of publicity. In *Southeast Bank*,[50] the New York Court of Appeals declined to "pass upon the question of whether a common law descendible right of publicity exists in New York." The case of J*ames v. Delilah Films* further illustrated New York's position. The predecessors in interest of a music group called the "girls group" brought a claim for misappropriation of the group's likeness for marketing and advertising purposes. The court held that, as successors in interest, the plaintiffs had "no cause of action under Civil Rights Law . . . sections 50 and 51, as the statutory rights created by said law do not survive death."[51] The court further held that whatever rights of privacy the performers had were "extinguished at their death."[52] New York has continually upheld the court's finding in *James*, to the detriment of such person's right of publicity.[53]

New York bases its right of publicity in sections 50 and 51 of the New York Civil Rights Code.[54] Sections 50 and 51 were enacted to address dissent against previous New York decisions holding against a right of publicity.[55] Section 50 states: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."[56] Section 51 states: "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent . . . as provided . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof . . ."[57] These laws severely limit claims that can be brought for misappropriation. Until 1985, the statute listed only unauthorized commercial use of one's name, photograph and picture. In 1985, the statute was finally amended to include the "misappropriation of one's voice."[58]

While these statutes may have been a step toward greater protection for one's image when they were enacted, they have become outdated compared with other states' legislation, as discussed below. Narrowing the protection to "advertising"[59] and "trade"[60] purposes fails to recognize the widespread protection needed to protect a celebrity's image. Further, because of New York's narrow statutory protection, the right of publicity is not considered a property right, therefore preventing the right from being descendible. As long as New York courts continue to find the right of publicity still rooted in the right of privacy statute, a celebrity's rights in his person will not be protected. To grant the celebrity persona the proper protection for his image, New York must acknowledge that the right of publicity should be both alienable and descendible. The following examples will provide a discussion of alternatives to New York's approach, all of which consider the right of publicity a property right, and grant the right some form of descendibility.

Tennessee's Position—Elvis' Legacy

Tennessee's Personal Rights Protection Act of 1984 (the "Act")[61] settled the confusion that had arisen due to cases concerning the use of Elvis Presley's persona.[62] This line of cases involved claims brought by parties holding an interest in Elvis' image against defendants who were using it for commercial items and marketing.[63] Disagreement resulted between the courts regarding the right of descendibility of Elvis's image.[64] The court in *Memphis Development Foundation v. Factors*, holding that the right of publicity should not pass to the individual's heirs, observed: "Our legal system normally does not pass on to heirs other similar person's attributes even though the attributed may be shared during life by others or have some commercial value. Titles, offices and reputation are not inheritable. Neither are trust or distrust and friendly or enmity descendible. . . . Fame falls in the same category as reputation; it is an attribute from which others may benefit but may not own."[65]

Outcry and confusion over the Elvis cases led to the Tennessee legislature's desire to resolve the debate over the descendibility or the right of publicity. The Act, while codifying a right of publicity, stated that such rights are "freely assignable and licensable" and further "do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to . . . [the individual's] . . . assigns, heirs, or devisees."[66]

Tennessee's law is not without its limitations. The Act requires that the estate of the deceased must exploit the individual's right of publicity after the individual's death.[67] This right may terminate if there is no exploitation of the right of publicity for a two-year period following the tenth anniversary of the death.[68] In 1987, in *State ex rel. Elvis Presley International Memorial Foundation v. Crowell*,[69] the court found that Presley's estate had the exclusive right to control the use of Elvis' name. The court acknowledged the Act, but also alluded to Tennessee common law property rights, citing unjust enrichment as important in its decision.

The Act allows for perpetual control over the commercial rights of decedents, so long as the heirs are exploiting some attribute of the decedent's persona.[70] Yet the Act is not without fault with regard to the right of publicity. Under the Act, the legislature seems to hold that a decedent's rights are "not worth protecting unless it is commercially exploited by the decedent's heirs every two years for monetary gain."[71] Such a provision has been excluded from more recent and broader rights of publicity legislation in other states.

Indiana

Indiana has also formed its right of publicity as a right that stems from property and estate law.[72] The statute states that the rights are "property rights, freely transferable and descendible, in whole or in part."[73] Further, the statute extends this right for 100 years after a celebrity's death.[74] This statute is hereby mentioned because it was used as a model for California's progressive statute, enacted in 1998.

California

In 1998, California passed the nation's most far-reaching legislation, California Civil Code section 3344,[75] designed to improve right of publicity protections.[76] This law came in the wake of Princess Diana's tragic death and at the behest of the Screen Actors Guild. Section 3344 makes it a tort to use a person's "name, voice, signature, photograph or likeness" for commercial purposes.[77] Even further, California added section 990, which made it a tort to use a deceased celebrity's image for commercial purposes.[78] Section 990 also provides for the alienability and the descendibility of the right of publicity to prevent the commercial exploitation of the deceased with the consent of the estate.[79]

California also acknowledged the argument that a right of publicity for the deceased would violate First Amendment rights. Taking into account these First Amendment issues, sections 3344 and 990 make exclusions for a "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works."[80] Further, if the deceased did not transfer his or her rights by contract or by means of either a trust or testamentary document, and there were no surviving family members, the rights terminated.[81]

Further amendments in California began in 1989 with the case brought by Robyn Astaire, Fred Astaire's widow.[82] Robyn Astaire brought suit against the maker of an instructional dance video who had used Fred Astaire's digitally enhanced image.[83] The court found such video to be a "film" and therefore exempted under then section 990(n)[84]. A number of celebrities' families then helped Robyn Astaire move for legislative reform.[85] After much debate and backlash, the Astaire Celebrity Image Protection Act amended section 990.[86]

Three main revisions were made by the amendments. First, the period of protection governing the unauthorized commercial use of the names and likenesses of deceased celebrities was extended from fifty to seventy years,[87] making the period of protection the longest among all states with the exceptions of Indiana and Oklahoma.[88] Second, the exceptions were revised.[89] Third, the protections were extended to any action occurring in California.[90]

With the recent amendments, California's statutory protection of the right of publicity should pave the way for future protection in the United States. California, home of the major movie studios, will continually be looked upon to continue the evolution of the right of publicity and to set the standard for the protection of this right. New York, holding similar power within the entertainment industry, should now look to follow in California's path.

Conclusion

Individuals who have "long and laboriously nurtured the fruit of publicity values should be the sole arbiter of how the commercial value of their image is exploited, if at all."[91] New York should acknowledge this idea and follow states such as Tennessee, Indiana and California, that have done so. The evolution of the right of publicity calls upon New York to firmly separate that right from the right of privacy. This separation will clarify the rights granted under this doctrine and securely protect the rights deserving of those who have developed their celebrity persona.

Because New York has not recognized the right of publicity as one separate from the right of privacy, it has misunderstood the "right" itself. The right of publicity has become a right unto its own, one based more in property law than in privacy law. Basing the right of publicity in property law gives celebrities additional protection over their images. Further, it creates the economic incentive to develop and create one's image. Lastly, such a right is in line with the reasoning expressed by the court in *Haelan*,[92] that the right of publicity is one separate from the right of privacy, one that is meant to prevent individuals from reaping financial gains based on the unauthorized use of a celebrity's image.

Further, a federally protected right of publicity will eventually be needed. A federal law would provide order to the current chaotic patchwork of state laws, and would resolve the choice-of-law problems by eliminating forum shopping.

By following the lead of other states, New York will be both acknowledging a right of publicity and at the same time protecting the First Amendment rights that could be threatened by a broad, overreaching right of publicity. In a society that focuses such a great amount of attention on celebrities, it is only fair that New York grant the "celebrity persona" protection they deserve.

Endnotes

1. Jib Fowles, Starstruck 261 (1992).
2. Roberta Rosenthal Kwall, *Fame*, 73 Ind. L.J. 1 at 4 (1997) (discussing generally America's interest in celebrity and fame, and the history of it in United States culture). Kwall notes that criticism of the right of publicity has "become more vociferous in recent years," but that many within the American legal community still feel that "the doctrine deserves the recognition it has attained."
3. Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 Loy. L.A. Ent. L. Rev. 471 at 472. (2003).
4. *See Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580 (1984). *Also see Southeast Bank, N.A. v. Lawrence*, 483 N.Y.S.2d 218 (1984). Both cases are discussed in this article.
5. *See* section *infra*, "New York and State Laws Regarding Right of Publicity."
6. 4 Harv. L. Rev. 193 (1890).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Restatement (Second) of Torts § 652(A) (1977). This restatement codified the four torts defined in William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). Prosser specifically outlined four violations of the right to privacy.
13. Kwall, *supra* note 2, at 7.
14. *Id.*
15. 8 F. Supp. 358 (1934).
16. *Id.*
17. 202 F.2d 866 (1953).
18. *Id.*
19. *Id.*
20. *See generally id.*
21. *Id.*
22. *Id.* at 868.
23. *Id.*
24. 433 U.S. 562 (1977).
25. *Id.*
26. Lee, *supra* note 3, at 491, stating that *Zacchini* emphasized that the action before it involved "what may be the strongest case for a 'right of publicity'—'involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place." Yet the *Zacchini* Court emphasized that nothing in its ruling would have prevented the television station defendant from broadcasting a news story that merely named the plaintiff and described the act. The *Zacchini* Court left the question open as to how much would be necessary to be considered a violation of the right of publicity.
27. Restatement (Third) of Unfair Competition.
28. N.Y. Civ. Rights Law §§ 50–51.
29. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (1953).

30. Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 11 J. Bankr. L. & Prac. 441, 444 (2002).

31. *Id.* at 445.

32. Rhett H. Laurens, *Year of the Living Dead: California Breathes New Life Into Celebrity Publicity Rights*, 24 Hastings Comm. & Ent. L.J. 109, 141 (2001).

33. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (2001) (hereinafter "*Hoffman II*").

34. *Id.*

35. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 873 (1999) (hereinafter "*Hoffman I*").

36. *Hoffman II*, 255 F.3d 1180.

37. *See Midler v. Ford Motor Co.*, 849 F.2d 460 (1988); *Waits v. Frito Lay*, 978 F.2d 1093 (1991); *White v. Samsung Electronics*, 971 F.2d 1395 (1992).

38. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 Geo. Wash. L. Rev. 1097, 1098 (1999).

39. *See generally supra* note 33.

40. William H. Binder, *Publicity Rights and Defamation of the Deceased: Resurrection or R.I.P.?*, 12 DePaul-LCA J. Art & Ent. L. 297, 306–307 (2002).

41. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 Ind. L.J. 47 (1994).

42. *Id.*

43. Currently, these states are California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

44. Binder, *supra* note 40, at 307.

45. New York and Ohio are the only states which have held against a descendible right of publicity.

46. *See supra* note 5.

47. 474 N.E.2d 580 (1984).

48. *Id.* at 584.

49. *See Welch v. Group W. Products, Inc.*, 525 N.Y.S.2d 466, 468 (1987) and *Dana v. Oak Park Marina, Inc.*, 660 N.Y.S.2d 906, 909 (1997) (all holding that there is no additional common law protection for the right of privacy or right of publicity).

50. *Southeast Bank, N.A. v. Lawrence*, 483 N.Y.S.2d 218 (1984).

51. *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447 (1989).

52. *Id.* at 451.

53. *See Prione v. MacMillan, Inc.*, 894 F.2d 579, 585 (1990) (holding that the statute's right to privacy protection is "clearly limited to any living person"); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284–85 (1997), *rev'd on other grounds after remand*, 652 F.2d 278 (1987); *Smith v. Long Island Jewish Hillside Med. Ctr.*, 199 N.Y.S.2d 167, 168 (1986); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1010 (1981) (stating that New York courts have found the statutory right of privacy to be neither descendible or assignable).

54. N.Y. Civ. Rights Law §§ 50–51.

55. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 129 (1984). (The court here acknowledged that the enactments of sections 50 and 51 of the Civil Rights Law were fueled by public dissent over the decision in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (1902) (dismissing a right of privacy claim)).

56. N.Y. Civ. Rights Law § 50.

57. N.Y. Civ. Rights Law § 51.

58. N.Y. Civ. Rights Law §§ 50–51 (McKinney 1992) (amended 1995).

59. *Id.*

60. *Id.*

61. Tenn. Code Ann. §§ 47-25-1101 to 1108 (2001). The Act originated in the legislature as 1984 Tenn. Pub. Acts 945, before being codified in 1984.

62. *Memphis Development Foundation v. Factors, Etc., Inc.*, 441 F. Supp. 1323 (1977) (hereinafter "*Factors I*"); *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert denied*, 449 U.S. 95 (1980) (hereinafter "*Factors II*").

63. *Id.*

64. *Id.*

65. *See Factors II* at 958.

66. Tenn. Code Ann. § 47-25-1003(b).

67. *See supra* note 43.

68. Tenn. Code Ann. § 47-25-1104(b)(2).

69. 733 S.W.2d 89 (1987).

70. David C. Bodette, *Use It (Every Two Years), Or Lose It (Forever)—Tennessee's Personal Rights Protection Act and the Post-Mortem Right of Publicity*, 33 U. Mem. L. Rev. 83, 103 (2002).

71. *Id.*

72. George P. Smith II, *The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right*, 54 S.C. L. Rev. 1, 30 (2002). Referring to Ind. Code Ann. § 32-36-1-7.

73. Jonathan L. Faber, *Indiana: A Celebrity-friendly Jurisdiction*, Res Gestae, Mar. 2000, at 28.

74. Ind. Code Ann. § 32-36-1-8.

75. Cal. Civ. Code § 3344.

76. Smith, *supra* note 72, at 30.

77. Cal. Civ. Code § 3344.

78. Cal. Civ. Code § 990.

79. Cal. Civ. Code § 990.

80. Cal. Civ. Code §§ 3344, 990.

81. Cal. Civ. Code § 990(b), (e).

82. *See supra* note 33 at 121–122.

83. *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297 (1997), *cert denied* 119 S. Ct. 161 (1998).

84. *Id.*

85. *See supra* note 33, at 120–128.

86. *Id.*

87. 1999 Cal. Legis. Serv. Ch. 998(g) (S.B. 209).

88. *See supra* note 33, at 128.

89. 1999 Cal. Legis. Serv. Ch. 998(a) (S.B. 209).

90. 1999 Cal. Legis. Serv. Ch. 998(n) (S.B. 209).

91. Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 216 (1954).

92. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (1953).

Adam Zia is a J.D. Candidate, May 2004 from Fordham School of Law and is the President of the Fordham School of Law's Entertainment Law Student's Association. Adam graduated with a B.A. from the University of Maryland.

Royalty Payments Under a Typical Record Contract

By Vlad Kushnir

A record agreement is the contract between a recording artist and a record company and is the most important contract any recording artist can sign. A typical agreement grants the record company the right to engage the artist's exclusive services as a recording artist for recording phonograph records embodying the artist's performance. Such an agreement can easily be 75 pages in length and its clauses virtually incomprehensible not only to laypersons, but also to those legal practitioners who are not familiar with the customs and jargon of the music industry.

This article provides a brief overview of the mechanisms by which royalties are calculated under a typical record agreement.[1] What makes the royalty clause of a record contract unique is the fact that the clause cannot be analyzed in isolation from the rest of the legal document. Other parts of the contract can be filled with hidden traps that will significantly reduce the amount of money that the artist will receive.

Two Copyrightable Works

Every song on a CD or cassette consists of two separate copyrightable works. First, there is the underlying musical composition (the song itself). Second, there is the product of studio recordings, which consists of the music production and the performance of the song by the recording artist. The relevant statutory distinction is found in section 102 of the Copyright Act (the "Act"), which lists several categories of copyrightable works. Among the categories are "musical works, including any accompanying words"[2] and "sound recordings."[3]

Accordingly, every CD sale generates two separate streams of income. First, there are royalties payable to the copyright owner/proprietor (i.e., songwriter(s) and/or music publisher(s)) of the underlying musical works. Second, there are royalties payable to the recording artist (and producer) for its/their recording services. Both streams of income are calculated differently and are subject to different industry rules and customs.

"Musical Works" and Songwriters' Royalties

Description and Basic Royalty Computations

The Act does not define the term "musical works," for it requires no special definition. A musical work is the product of songwriter(s) who write the music and/or lyrics of the song. The songwriter is the initial owner of the song, since the copyright in the song "vests initially in the author or authors of the work."[4] Section 106 gives the songwriter(s) several exclusive rights, including the right to reproduce the work in copies and phonorecords and the right to distribute copies or phonorecords to the public.[5] In order to secure the right to use the song, the record company usually obtains a license from the copyright owner(s). The license, often referred to as a "mechanical license," allows the record company to reproduce the song on phonorecords[6] and then distribute the phonorecords to the public. In exchange for the grant of the license, the songwriter will receive the so-called "mechanical royalties" for all phonorecords that are made and distributed.

> *"The [Copyright] Act does not define the term 'musical works,' for it requires no special definition."*

Section 115 of the Act provides for a compulsory license to make and distribute phonorecords of certain musical works.[7] While compulsory licenses are rarely used, the section is important to our discussion due to the fact that it provides for the statutory royalty rate to be paid for a compulsory license. This rate has been used by the music industry as the guideline for calculating all (and not just compulsory) mechanical royalties. The rate is established by Copyright Royalty Arbitration Panels[8] and is biannually increased in order to keep up with inflation. The most recent royalty rates are as follows:[9]

> -Period of 01/01/2002 – 12/31/2003:
> *8.0 cents or 1.55 cents per minute of playingtime or fraction thereof, whichever is greater.*
>
> -Period of 01/01/2004 – 12/31/2005:
> *8.5 cents or 1.65 cents per minute of playingtime or fraction thereof, whichever is greater.*

According to the statutory rates, a 14-song CD should generate $1.19 in mechanical royalties in 2004 (14 x $0.085 per song).[10]

Since the statutory rate is biannually increased, it is in the record company's best interest to lock the rate in on the earliest date possible (e.g., the date of execution of the record contract). The artist, on the other hand, certainly wants the latest date possible and should seek to use the date of the album's release. This can be especially important in the case of a "Best Of" or "Greatest Hits" album, since the "Best Of" compilation can be released years after the contract was executed.

Controlled Composition Clause

Recording artists frequently write their own songs and, thus, are compensated as both songwriters and recording artists. Seeking to reduce the amount of money payable to such artists/songwriters, the record industry has invented the concept of "controlled compositions." The term "controlled composition" is usually defined as a song written or composed, in whole or in part, by the artist, or owned or controlled in whole or in part, directly or indirectly, by the artist.

If the contract contains Controlled Composition Clause, the artist/songwriter will be required to accept a reduced mechanical royalty rate for the controlled compositions embodied in the album (i.e., for the songs written/controlled by the artist). A typical Controlled Composition Clause provides that the artist will receive a royalty rate equal to 75% of the current minimum statutory rate per song.[11] Further, regardless of the number of controlled compositions and/or other compositions contained on the album, the aggregate copyright royalty will be limited to 10 times the applicable rate.

In the previous example, we saw that a 14-song CD would generate $1.19 in mechanical royalties in 2004. What happens if the contract contains Controlled Composition Clause? First, the applicable statutory rate will be reduced from $0.085 to $0.064 per song (75% of $0.085). Second, despite the fact that the CD contains 14 songs, the aggregate royalty will not exceed 10 times the applicable rate of $0.064. Hence, the CD will only generate $0.64 in mechanical royalties. As we can see, the clause has reduced the total amount of mechanical royalties by almost 50% (from $1.19 to $0.64). If the album eventually sells 1,000,000 copies, the record company will save $550,000 in mechanical royalty payments.

In addition to the significant reduction of the amount of royalties, the artist/songwriter faces another danger. It is possible that the artist had previously signed a publishing contract with a music publisher. The music publisher is not a party to the record contract and, therefore, is not obligated to accept the reduced mechanical rate. Hence, the publisher may refuse to agree to the reduction and the recording artist will be forced to compensate the publisher for the difference out of his pocket. To make the situation even worse, some agreements will apply the reduced rate to non-controlled compositions (i.e., songs written/controlled by third-party songwriters/publishers), which can lead to absolutely devastating results for the artist/songwriter.

In the previous example, we saw that the Controlled Composition Clause limited the mechanical royalty to $0.64 per CD. Now, let us assume that 8 out of 14 songs on the CD are controlled by a third-party publisher who refuses and/or is not obligated to accept the reduced royalty rate. The publisher is entitled to $0.68 in mechanical royalties ($0.085 x 8 songs). As a result of the $0.64 limit, the artist will not only be completely deprived of any mechanical royalty income, but will also be responsible for the 4-cent difference. The record agreement will certainly state that any excess of the mechanical royalties will be deductible from the funds otherwise payable to the artist for royalties.

Finally, most Controlled Composition Clauses will reduce the amount of mechanical royalties in the following respects: (1) No royalties will be paid for "free goods" and the albums sold below the wholesale price; (2) the applicable royalty rate will be further reduced in the case of mid-priced or budget sales; (3) only one mechanical royalty rate will be paid if a song appears more than once on the album (e.g., some albums contain re-mixes, or acoustic and/or rock versions of the same song).

Needless to say, the artist's attorney must fiercely oppose the Controlled Composition Clause. If the artist lacks enough bargaining power to eliminate the clause altogether, his attorney should at least seek to do the following: (1) Increase the per-album limit from 10 to 12; (2) eliminate any rate reductions for non-controlled compositions; (3) negotiate for rate increases upon reaching certain sales plateaus (e.g., 75% of the statutory rate for the first 500,000 albums sold; 85% for the sales between 500,000 and 1,000,000 copies and 100% for the sales above 1,000,000 copies); (4) negotiate for higher rates for subsequent albums; and (5) negotiate for higher rates if the songs are to be published/co-published by an affiliate of the record company.

"Sound Recordings" and Artist Royalties

Description

Section 101 of the Act defines the term "sound recordings" as works that "result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[12] While the underlying musical work is the creative product of the songwriter(s), the sound recording is the product of the recording artist and music producer (i.e., actual vocal and/or instrumental performance, selection of sounds, positioning of microphones, selection of sound effects and music editing) combined. Among the exclusive rights granted to the owner of copyright in a sound recording are the right to reproduce the work in copies and phonorecords and the right to distribute copies or phonorecords to the public.[13]

Record contracts ordinarily treat the artist's recording services as a "work made for hire."[14] In the case of a "work made for hire," the "employer or other person for whom the work was prepared is considered the author" for the purposes of the copyright law.[15] Hence, the record company, by virtue of being treated as the employer/author, is the owner of all rights, title and interest in, and to all recordings embodying the results and proceeds of, his recording services (excluding, of course, the right to the musical compositions embodied therein). In exchange for his exclusive services as a recording artist, he will receive certain royalties and advances.

Basic Royalties Computations

Overwhelmingly, the artist royalty is expressed in terms of a percentage of the applicable "Suggested Retail List Price" (SRLP). The percentage depends on the bargaining power of the artist. Thus, while new artists typically receive between 9% and 12%, a superstar can negotiate as much as 25% of the SRLP. Assuming that the current applicable SRLP is $17.99 per CD and that the deal provides for a 12% royalty rate, a new artist may be entitled to receive a maximum of $2.16 for each CD sold (12% of $17.99). Although the basic royalty computations appear straightforward, the record industry has developed many methods to reduce the amounts of money payable to artists. Such methods are discussed below.

In a limited number of cases, the royalty is expressed in terms of a percentage of the wholesale price. The wholesale price is approximately one-half of the SRLP. Thus, the royalty rate based on the wholesale price is usually twice the SRLP rate. Record agreements rarely express artist royalties in terms of dollars and cents. If that is the case, however, the artist should make sure that his royalties are not frozen at a certain number and that they reflect any increases in retail prices.

The artist's attorney must seek to include a sliding-scale percentage escalation of royalties based on the achievement of sales plateaus. For instance, an agreement may provide that the artist will be paid 9% of the SRLP for the first 500,000 albums sold; 10% of the SRLP for the sales between 500,000 and 1,000,000 copies and 11% of the SRLP for the sales over 1,000,000 copies. The rate increases are not retroactive (i.e., the artist will receive only 9% of the SRLP for the first 500,000 albums despite the fact that the album eventually sells two million copies). In addition, the attorney should negotiate a similar sliding-scale royalty escalation for subsequent albums (e.g., the royalty rate for the third album will be higher than the rates for the first two albums).

If the contract gives the artist, for example, a 12% royalty rate, this rate will be applied only to albums sold at full prices (i.e., "top-line" or "full-priced" items). Further, the rate will be applied only to the albums sold through traditional distribution/retail channels (e.g., retail record stores) and only to albums sold in the United States.

Discounted Price Lines

Lower royalty rates will be applied to albums sold at discounted prices. The so-called "mid-priced" albums are usually the albums that bear a price of 65%-80% of the top-line SRLP. The record company will pay only 75% of the artist royalty rate for the "mid-priced" records (i.e., 75% of 12%). The so-called "budget" albums are usually the albums that bear a price of less than 65% of the top-line SRLP. The record company will only pay 50%-65% of the artist royalty rate for the "budget" items (e.g., 50% of 12%). The artist will receive nothing for the so-called "cut-outs" and scrap (i.e., albums sold as heavily discounted or surplus items). Frequently, artists are able to negotiate a contract clause that would prevent the record company from selling copies of the album as "cut-outs" for a certain period of time after the album's release. Also, the artist should be able to secure the first opportunity to purchase his "cut-out" copies at the discounted price.

Foreign Royalties

Lower royalty rates will also be applied to albums sold in foreign countries. With respect to Canada, the artist's attorney should attempt to remove any royalty reductions. However, in many cases, the artist will be forced to accept a royalty rate of 85% of the U.S. rate. Royalty rates for albums sold in Europe, Australia and Japan are typically 75% of the U.S. rate. For the rest of the world, royalty rates are 50% of the U.S. rate.

It must be noted that some record companies have affiliate record companies in other countries, while some simply license the masters to third-party licensees. The artist's attorney should attempt to negotiate a higher foreign royalty rate in the event that the record company has its own affiliate in that country.

Record Clubs and Other Non-Traditional Retail Channels

Most of us are familiar with record clubs. By joining a record club, a member agrees to purchase a fixed number of albums. In exchange, the club offers the member a certain number of free selections. There are two large record clubs in the United States. BMG Music

Service Club, formerly part of the RCA family, was acquired by Bertelsmann in 1987.[16] Columbia House was formerly a joint venture of Sony Music Entertainment and Warner Music. In 2001, a majority interest in the club was acquired by Blackstone Capital Partners (Sony Music Entertainment and Warner Music continue to own minority interests in the company).[17]

Record clubs operate by obtaining from record companies a license to manufacture and distribute the albums. Typically, the artist's royalty is one-half of the net receipts received by the record company from its licensees. Alternatively, some agreements provide that the royalty shall be one-half of the top-line royalty rate but no more than one-half of the net receipts received by the record company from its licensees. The artist does not share in any advances received by the record company from its licensees.

The artist's attorney should limit the number of free goods that can be given away by a record club as free selections. With some bargaining power, the attorney can be successful in limiting free goods to a one-for-one basis (i.e., if only 100 albums were sold through the club, no more than 100 copies can be given away as free selections). The attorney must make sure that the one-for-one limit applies to the attorney's artist and not to the record company's entire catalog. Further, the attorney must negotiate the definition of the period used to calculate records sold and records given away as free selections. Finally, the attorney must attempt to obtain a higher royalty rate in the situation where the record club is an affiliate of the record company.

The same rate of "one-half of the net receipts received by the record company from its licensees" typically applies to records sold, for example, via TV/radio advertisements, mail order and special retail outlets. However, the artist shall receive his full top-line royalty rate for albums sold directly by the record company (i.e., not through third-party licensees) via advertisement and mail order. With respect to albums sold through Armed Forces Post Exchanges and ship stores, record agreements typically provide for one-half or three-fourths of the top-line royalty rate.

Other Contract Provisions that Reduce Artist Royalties

The "90%" Provision

In some cases, a record agreement will state that the artist will receive royalties on only 90% of net album sales. The entire idea of the 10% discount was born years ago when a large number of vinyl albums would break during shipping. However, there is hardly a convincing explanation for inserting the "90%" provision in a modern contract.

Packaging Deductions (Container Deductions)

The record industry insists on excluding the cost of album packaging from the SRLP for the purpose of calculating artists' royalties. Essentially, this is nothing more than an artificial way to reduce the royalty payments. The deduction can be as high as 25% of the SRLP for CDs and 20% for cassettes. Therefore, if the artist's royalty rate is 12% of the SRLP ($17.99), the SRLP may be reduced by 25% from $17.99 to $13.50 for the purpose of calculating the royalties. Thus, the artist will receive only $1.62 for each CD sold (12% of $13.50). The royalty payment of $1.62 represents 9% of the pre-deduction SRLP of $17.99. Hence, while the contract may provide for the royalty rate of 12%, the artist will receive only 9% of the SRLP.

Free Goods and Returns

Artists receive money for the records that are sold and not returned. An artist will not be paid for the records his company gives away for free. Some copies are legitimately given away for free in order to promote the album. For instance, the company will give free copies to radio stations, music critics and concert promoters. Such freebies are considered legitimate and undisputable.

Yet record companies will also give away what are called "phony" free goods. By doing so, the record company achieves two goals. First, it effectively reduces the amount of royalties payable to the recording artist. Second, the "phonies" serve as an effective sales incentive when the company is dealing with retailers. For example, the record company can provide a retail store with 100 CDs for $12.00 per CD. Alternatively, the company can offer the retailer 15 free CDs if it agrees to purchase 85 CDs for $14.12 per CD. Financially, it makes absolutely no difference to the record company, as the retailer will end up paying $1,200 for 100 CDs in either case. However, only 85 CDs will bear any artists' royalties, since only 85 CDs will be deemed "sold." The artist's attorney must seek to limit the number of copies the company can treat as free goods (e.g., no more than 15%).

Albums reach retail stores through distribution companies and on a consignment basis. Thus, the stores will return any unsold albums to the distributor (which, in turn, will return them to the record company). Naturally, the artist shall not be entitled to any royalties for the unsold records. The problem lies in the fact that it may take months before the unsold records are actually returned. The typical solution is for the record company to withhold a percentage of the payable royalties (usually 25%) as a reserve. In addition, many agreements give record companies the right to periodically adjust reserves based on actual returns. The contract must prevent the company from keeping the withheld reserve for an indefinite period of time. Thus, the artist must negotiate for the reserve to be liquidated (i.e., paid to the artist) within a specified period of time (e.g., two years).

New Technology Reductions

Record companies also pay reduced rates on "new technology" formats (one recent example is the mini-disk). The record agreement will typically force the artist to accept a 15% reduction for albums sold in the new format. The artist's attorney must prevent the record company from applying the reduced rate for an indefinite period of time. For instance, the contract may provide that the reduction will cease when the record company begins paying higher rates to other artists. Alternatively, the contract may say that the reduction will cease after a certain period of time (e.g., three years) following the introduction of the new format to the general public (the contract should also provide for good-faith negotiations between the parties in order to arrive at a reasonable royalty rate).

Putting It All Together

In most cases, an agreement will provide that the artist's royalties are "all-in" royalties. The term "all-in" means that the royalty payable to the artist shall include the royalties payable to the producer(s).

For an example of how the artist's royalty will be calculated under a typical record contract, let us consider a record contract that contains the following terms: (1) The artist's "all-in" royalty for top-priced CDs is 12% of the SRLP; (2) the packaging deduction is 25% for CDs; (3) 15% of albums can be treated as free goods; (4) the reserve for returned albums is 25%. The artist sells 1,000,000 copies of full-priced CDs in the United States through traditional retail channels.

First, the 25% packaging deduction will reduce the SRLP from $17.99 to $13.50. Hence, each CD will generate a royalty of $1.62 (12% of $13.50). Second, only 850,000 copies will be deemed "royalty-bearing" due to the 15% allowance for "free" goods. Third, the 25% reserve will reduce the amount of money otherwise payable to the artist.[18] Hence, the artist will receive only $1,032,750 ($1.62 x 850,000 x 0.75) or $1.03 per each CD sold at the retail level. The royalty amount of $1.03 equals approximately 5.73% of the SRLP of $17.99. As we can see, the artist will be paid a royalty of less than 6% of the SRLP despite the fact that the contract provides for a 12% royalty rate. In addition, since the artist royalty is an "all-in" royalty, the artist will have to share a portion of the earnings with the producer. Finally, as we shall see below, the entire amount of $1,032,750 can easily be wiped out, since the record company will recoup certain expenses from the royalties otherwise payable to the artist.

Recoupable Expenses

Advances and Recording Costs

A record company will typically agree to pay advances to the artist for each album recorded. The company will also pay for all recording costs with respect to each album. In most cases, the artist's advance will include the recording costs. For example, a contract may provide for a $300,000 advance. If the artist incurs $250,000 in recording expenses, the company will pay the $250,000 on behalf of the artist. The artist will be entitled to keep the remaining $50,000. A typical agreement will define "recording costs" as all direct costs incurred in the production of masters including, without limitations: All sums paid to the individual producer(s), musicians, vocalists, conductors, arrangers, orchestrators, copyists and engineers; transportation costs, hotel, living expenses, immigration clearances and per diem incurred in connection with the attendance of artists, the individual producer(s), musicians and other essential personnel at recording sessions and the preparation thereof; payments to a union or guild trustee or fund based on services at recording sessions, payments for studio or rehearsal hall rental, instrument rental, editing, mixing and other similar functions; reference dubs; equalizing time; payments for "sample" clearances and all other incurred costs which are now or hereafter generally recognized as recording and mastering costs in the phonograph record industry. Hence, virtually every imaginable expense can eventually be recouped from the artist's future royalty payments.

The first-album advance will typically be a fixed amount of money. In the case of a new artist signed to a major record label, the advance would be somewhere between $300,000 and $500,000. In the case of a superstar, it can be a multi-million dollar figure. With respect to the subsequent albums, the advances can also be expressed in terms of fixed numbers. Alternatively, it is a very common practice to express the subsequent advances in terms of a percentage of royalties earned by the artist from the sale of the previous album. For example, the contract may provide that the advance for the second album shall be in the amount of 65% of the royalties earned by the artist during the period of one year from the release of the first album. Hence, if the artist earns $500,000 in royalties within one year from the release of his first album, he will receive a $325,000 advance for the second album (65% of $500,000).

Yet, what happens if the artist earns only $75,000 in royalties for the first album? The amount of $48,750 (65% of $75,000) will not cover all recording expenses for the second album. On the other end of the spectrum, what if the artist earns $10,000,000 for the first album? Certainly, the record company will not want to pay $6,5000,000 (65% of $10,000,000) as the advance for the second album. Therefore, the contract will provide for the “floor” and “ceiling” numbers. For example, the agreement will provide that the advance for the second album shall be no less that $250,000 and no more than $500,000.

Status of Advances (Including Recording Costs)

All advances and recording costs are recoupable but not returnable. If the artist receives $500,000 as an advance for his first album and earns $625,000 in artist royalties, he will only be entitled to receive $125,000 in royalty payments. If the artist earns only $300,000 in royalties, he will not receive any money from the record company (i.e., his royalty account will bear a deficit in the amount of $200,000). The advance is not returnable in the sense that the company cannot force the artist to return the advance or any portion thereof. The record company is taking the risk that it might not recoup the amount of the advance.

While the company cannot go after the artist in order to collect any deficit, the agreement will give the company the right to recoup any deficit from the royalties payable to the artist for the sale of subsequent albums. Here is a typical example: The artist receives a $500,000 advance for the first album and earns $150,000 in royalties from that album. Then, he receives a $500,000 advance for his second album and earns $200,000 in royalties from that album. Finally, he receives a $500,000 advance for the third album and the third album is a hit that generates $1,000,000 in royalties. Despite the success of that album, the artist’s royalty account will bear a deficit of $150,000 (the difference between $1,500,000 in advances and $1,350,000 in royalties). This practice is called cross-collateralization. The artist’s attorney must make sure that the cross-collateralization does not affect any advances for future albums. For example, the artist should receive his advance for the second album in addition to any royalties payable for the first album (i.e., the amount of the advance for the second album should not be reduced by the amount of royalties paid to the artist for the first album).

In addition, a record company may attempt to cross-collateralize artist royalties and mechanical royalties (i.e., recoup advances and recording costs from mechanical royalties payable to the artist). This can be achieved if the artist’s music publisher is an affiliate of the record company. The artist’s attorney should seek to eliminate any such cross-collateralizations from the deal.

Other Recoupable Expenses

There are other expenses that are treated as additional advances which are recoupable out of royalties that might otherwise become due to the artist. Some examples include: (1) promotional tour support; (2) independent promotion expenses (i.e., payments for services rendered by third-party entities) and (3) costs of making videos.

It must be noted that some videos are sold to the general public and, hence, will generate income. Thus, the artist must negotiate a royalty schedule with respect to such releases. The artist should be entitled to royalty payments after the record company recoups the costs of making the video from the sales proceeds. In most cases, however, videos are used strictly as promotional tools (played on MTV, BET and VH-1) and do not generate any income. Hence, the costs of making promotional videos will be recouped from album royalties.

With some bargaining power, the artist should seek to negotiate more favorable terms with respect to some promotional expenses. For instance, the record company may agree that only 50% of the costs of making the video will be recoupable from the artist’s royalty account.

Conclusion

In 2000, the controversial singer and actress Courtney Love[19] published an essay describing her personal experiences of being a recording artist.[20] The facts alleged in the essay provided a wonderful example of how a typical record contract works in real life.

As a result of a bidding war among several record companies, Love was able to secure a record deal that provided for a $1,000,000 advance and a royalty of approximately $2.00 per record. Out of the advance, $500,000 was spent on recording the album, and the group was able to retain the other $500,000. The singer claims that each member of the group was able to keep only $45,000 after all taxes, legal fees and manager’s fees were paid. The album sold 1,000,000 copies (at full price, with no discounts or record clubs). Hence, the sales generated $2,000,000 in artist royalties. However, the following expenses were recouped from her royalty account: (1) the $1,000,000 advance; (2) 100% of $200,000 in tour support; (3) 100% of $300,000 that the company spent on independent radio promotion and (4) 50% of $1,000,000 the company spent on making two videos. As we can see, the recoupable expenses wiped out Love’s entire royalty account.

As we saw from the preceding examples, an attorney must clearly understand the interplay among all provisions of a record contract. Otherwise, he can “find himself negotiating what seems to be a good contract only to discover, after [his] client reaches the top of the charts and is considered the industry’s next superstar, that the contract is a total disaster.”[21]

Endnotes

1. Many other intricacies of a typical record agreement are beyond the scope of this article.
2. 17 U.S.C.A. § 102(a)(2).
3. 17 U.S.C.A. § 102(a)(7).
4. 17 U.S.C.A. § 201(a).
5. 17 U.S.C.A. § 106.
6. *See* 17 U.S.C.A. § 101 for the definition of "phonorecords."
7. 17 U.S.C.A. § 115.
8. Initially, the Copyright Act gave the authority to set the rate to the Copyright Royalty Tribunal. However, the tribunal was abolished in 1993 (Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304).
9. The entire history of the rate increases can be obtained by visiting <http://www.copyright.gov/carp/m200a.html>.
10. Of course, that royalty will be higher if we are dealing, for instance, with a 7-minute song. The song will generate 11.55 cents in royalties (7 minutes x 1.65 cents per minute of playing time).
11. By inserting the word "minimum," the record company will be able to disregard the "long-song" rates (i.e., 1.65 cents per minute for 2004). For example, the songwriter would receive $0.099 for a 6-minute song in 2004 (1.65 x 6). The controlled composition clause limits the payment to 6.4 cents for the song (75% of the minimum statutory of 8.5 cents). Further, as an incentive to have the copyright owner agree to a controlled composition clause, the record company will often offer an advance.
12. 17 U.S.C.A. § 101.
13. 17 U.S.C.A. §§ 106, 114.
14. The term is defined in 17 U.S.C.A. § 101.
15. 17 U.S.C.A. § 201(b).
16. For more information, visit <http://www.BMGMusic.com>.
17. For more information, visit <http://www.ColumbiaHouse .com>.
18. Certainly, it is possible that the artist will eventually receive the remaining 25% upon liquidation of the reserve.
19. Courtney Love is the lead singer of the rock group Hole and has starred in such films as *The People vs. Larry Flint* and *Man on the Moon*.
20. <http://dir.salon.com/tech/feature/2000/06/14/love/ index.html>
21. Jeffrey Brabec & Todd Brabec, Music, Money and Success 68 (1994).

Vlad Kushnir is a 2003 graduate of Temple University School of Law in Philadelphia. He was admitted to the Pennsylvania Bar in 2003 and is in the process of being admitted in New York and Washington, D.C. Vlad provides counsel to music industry professionals with respect to entertainment law, intellectual property and corporate law issues. He can be contacted via e-mail at vbk222@aol.com.

Do Professors Own Their Works?

By Alan J. Hartnick

Background

Who owns the work of a professor, he or his institution? The answer under the 1976 Copyright Act *appears* to be obvious; the college or university, because the work is a "work made for hire," prepared by an employee within the scope of his duties.[1] However, nothing is obvious in the copyright law! In addition, in order to avoid a strict interpretation of the Copyright Act, many schools have created handbooks that return the copyright in such works to the professors. Are such university policies *legal* transfers?

Is there a teacher exception? Two law professors sitting on the federal bench, in dicta, thought so. Judge Richard A. Posner[2] said: " . . . [in] the absence of any indication that Congress meant to abolish the [1909 Act] teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act." Judge Frank H. Easterbrook considered that the teacher exception " . . . has been the academic tradition since copyright law began."[3]

University policies that are used to permit faculty and staff copyright ownership are presently subject to special rules or individual negotiations, particularly regarding online courses, Web sites and software, which are of great economic value to the educational institutions.

A Surprising New Case, *Foraste v. Brown University*

Brown University adopted certain "Policies and Procedures Relating to Copyright" that were published in its *Faculty Rules And Regulations* and *Staff Information Guide, You and Brown* handbooks. The provisions included:

> *Ownership*: It is the University's position that, as a general premise, ownership of copyrightable property which results from performance of one's University duties and activities will belong to the author [except] . . .
>
> b. There is a prior written agreement between the author(s) and the University with respect to property rights.

The plaintiff was a photographer on Brown University's staff, and his works were covered by the handbook concerning copyrightable material.[4] He argued that the handbook constituted an express written agreement that altered the presumption of employer ownership in the work for hire provision. The plaintiff did not contend that he signed the handbook. Rather, he argued that it "would be illogical to have all Brown employees sign the policy."

The court held that: ". . . the work made for hire doctrine applies to the images in the absence of an express agreement to the contrary that is signed by both [plaintiff and defendant]. The Policy is patently inadequate to overcome the presumption of Brown's ownership under the work made for hire doctrine."[5]

Note that the so-called teacher exception was nowhere mentioned. Although the plaintiff was a staff photographer for the University, the same considerations mentioned earlier for the teacher exception could apply to this case. The litigation is ongoing and an expedited schedule has been set for an alleged transfer of copyright ownership.

Other Possible Approaches that Could Transfer the Brown University Copyright to Brown Staff Members

According to the court, the issuance of a Brown University handbook concerning policies and procedures relating to copyrights was a useless act, as it had no effect and did not override the statutory language of the Copyright Act. The court held that the statutory language "mean(s) precisely what it says." Yet there are at least four theories that could validate the purpose of the handbook:

The Teacher Exception

Let us take Judges Easterbrook and Posner at their word and thereby validate the theory that professors and other creative staff members keep the copyrights in their scholarly and other creative works.[6] This view relies on the absence of legislative history, but overrides the seemingly literal grip of section 201(b), requiring a writing for the transfer of works made for hire. To me, this seems to be a long shot. As an aside, some activist professors take the position that any provision for a work for hire "author" in the copyright law is unconstitutional because Article I, Section 8 refers only to "Authors," a natural person, and *not* to work for hire employers. Such view relies on the absence of legislation history.

Waiver

It could be argued that Brown University waived its copyright interest in its professors' creative works. A claim of waiver requires an "intentional relinquishment of a known right and an intention to relinquish it."[7] A waiver can arise by conduct "as to evince an intent not to claim the purported advantage."[8]

The handbook grants to the employee a copyrightable interest. From there, it would be a significant jump to then hold that Brown University thereby infringes on the staff members' copyrights. It could also be that the handbook itself would immunize the University for any use of such material for educational purposes. As such, although it would be difficult to argue a transfer from a waiver, it could be done.

The New "Intent of the Parties" Seventh Circuit Doctrine

In a derivative work case, *Xu Liu*,[9] the Seventh Circuit, based upon a jury finding and in the *absence* of a writing for transfer (which is required by section 204(a)), held that the parties *intended* that a defendant who owned the underlying work *also* owned the copyright in the derivative work. Section 204(a) was held to be inapplicable because the *intent* of the parties granted no copyright interest in the derivative work to the plaintiff. There was nothing for the plaintiff to transfer.

The Association of the Bar of the City of New York filed an *amicus curiae* brief to the Supreme Court (under the superb direction of Robert W. Clarida, Esq., of Cowan, Liebowitz and Latman) because the trial court awarded ownership to the commissioning party, based upon a determination of "the intent of the parties" without regard to the writing requirement of copyright law. According to the brief, "the Seventh Circuit's affirmance introduces gratuitous and costly uncertainty into the fundamental issue of copyright ownership by allowing ownership to become a jury question in circumstances where the Act unambiguously places [the ownership issue] outside the province of the jury as a matter of law."

Certiorari was denied in *Xu Liu*. A party other than the "initial" author of the derivative work can be the copyright owner *ab initio*. Practicality overcame purity. The legal fiction created by the Seventh Circuit, based upon intent of the parties, even in the absence of any work for hire or transfer writing, could be used to "transfer" the copyright interest to the faculty or staff member from Brown University. The staff member would own the copyright *ab initio*. The teacher exception could live!

Beneficial Ownership and Constructive Trust

If there is a strong equitable argument that the faculty or staff member should be the copyright owner, the Copyright Act permits courts to deem that party a "beneficial owner"[10] and, by operation of a constructive trust, validate the teacher exception. To me, this theory is a stretch.

Conclusion

The *Brown University* case discussed in this article does not bode well for the teacher exception. To me, the case disturbs legitimate expectations: Why have a handbook if the University need not comply? The *Brown University* case goes against a sense of justice.

As Judge Posner wrote, there is a "lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production."[11] The traditional practice is inconsistent with the Copyright Act, and, for this reason, handbooks were created to reverse the copyright law's presumption of initial ownership in the college or university.

To avoid legal uncertainty, handbooks *alone* do not transfer a copyright interest. There should be *written* contractual arrangements signed by both parties. Only in that way will there really be a teacher exception.

Endnotes

1. Definition, "work made for hire," 17 U.S.C. § 101.
2. *Hays v. Sony Corp. of America*, 847 F.2d 412, 415 (7th Cir. 1988).
3. *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987). *But see Vanderhurst v. Colorado Mountain College Dist.*, 16 F. Supp. 2d 1297 (D. Colo. 1998).
4. *Foraste v. Brown University*, 248 F. Supp. 2d 71 (D.R.I. 2003).
5. *Id*. at 81.
6. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. Chi. L. Rev. 590 (1987).
7. *Airco Alloys Div. v. Niagara Mohawk Corp*., 76 A.D.2d 68, 81, 430 N.Y.S.2d. 179, 187 (4th Dep't 1980).
8. *Gresser v. Princi*, 128 A.D.2d. 752, 753, 513 N.Y.2d 462, 464 (2d Dep't 1987).
9. *Xu Liu v. Price Waterhouse LLP*, 302 F.3d 749 (7th Cir. 2002), *cert. denied*, June 27, 2003 (02.1213).
10. *Stone v. Williams*, 970 F.2d 1043, 1052 (2d Cir. 1992); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 355 (2d Cir. 1986).
11. *Supra*, note 2.

Alan J. Hartnick is a partner in the New York City law firm of Abelman, Frayne & Schwab, former President of the Copyright Society of the U.S.A. and Chair of the Copyright and Trademark Committee of the Entertainment, Arts and Sports Law Section of the New York State Bar Association.

VLA

VOLUNTEER LAWYERS FOR THE ARTS www.vlany.org

VLA Summer Benefit 2004

VLA will honor its Outstanding Volunteer Attorneys at its 2004 Summer Benefit, which will be held at The Paula Cooper Gallery from 6:30 p.m. to 8:30 p.m. on Monday, June 7, 2004. Our party is the perfect way to introduce law firm summer associates and attorneys to the multi-faceted cultural life of New York while supporting a great cause—the VLA. Tickets are $125 per person for VLA members ($35 charitable contribution) and $150 per person for non-members ($60 charitable contribution). Please contact Jeff Klein at (212) 319-2787 ext. 18 for more information.

Since 1969, VLA has been the exclusive provider of pro bono legal services, mediation services, educational programs and publications and advocacy to the arts community in New York. VLA also serves as a public information resource center about legal issues that affect the arts. Through public advocacy, VLA frequently acts on issues vitally important to the arts community.

VLA Legal Services

If you would like to receive VLA's Case List, for more information, or to volunteer for any of the following VLA programs, call VLA's Pro Bono Coordinators Jeff Klein and Chris Macdougall at (212) 319-2787, exts. 18 and 14. VLA also holds a monthly New Volunteer Orientation. Please find upcoming dates posted on http://www.probono.net.

Pro Bono Case Placements

By placing cases with volunteer attorneys, VLA delivers pro bono legal services to low-income (per VLA guidelines) individuals and nonprofit arts organizations. The VLA Case List is e-mailed on the first and fifteenth of each month to our volunteer attorneys and pro bono coordinators. Cases are available on a variety of issues, ranging from trademark and copyright to nonprofit incorporation and 501(c)(3) status, corporate formation, contracts and licensing agreements. Artists from every discipline utilize VLA's services, including filmmakers, visual artists, playwrights, poets, directors, musicians, designers, dancers and actors. VLA requires all of its volunteer attorneys to be covered by legal malpractice insurance, and advises its clients that the attorneys must check for conflicts of interest on each case before agreeing to accept it.

Bi-monthly Legal Clinic

The VLA Legal Clinic is a bi-monthly forum for any VLA member to meet privately with an attorney to discuss his/her arts-related legal issues. The clinic provides an opportunity for attorneys to advise clients in a direct and effective manner. Held from 4:00 p.m. to 7:00 p.m. on the second and fourth Wednesdays of each month, the clinic also provides volunteer attorneys with a low-time commitment option.

CLE Credit for Pro Bono Work!

VLA has been approved to provide CLE credit for pro bono legal services rendered. Credit for pro bono legal services shall be awarded in the following ratio: One (1) CLE hour for every six (6) 50-minute hours (300 minutes) of eligible pro bono legal service. A maximum of six (6) pro bono CLE credit hours may be earned during any one reporting cycle.

VLA Mediateart Program

For more information, call VLA Director of Mediation Allison Mattera at (212) 319-2787 ext. 16.

VLA offers Mediation Training to arts professionals and attorneys for New York State Certification and pairs artists with mediators to resolve arts-related disputes outside the traditional legal framework.

Winter/Spring CLE Accredited Seminars

For more information or to register, call VLA Office Administrator Jonathan Tominar at (212) 319-2787 ext. 10.

VLA is pleased to announce that it has been approved by the New York State Continuing Legal Education Board to provide CLE credit for the following transitional classes. All workshops are held at VLA's office in the auditorium of The Paley Building, 1 East 53rd Street, Ground Level.

Areas of Professional Practice: 3 CLE credit hours include:

- Nonprofit Incorporation and Tax-Exempt Status
- Contract Basics for Arts & Entertainment Professionals
- Copyright Basics
- LLC, "C" Corp, or "S" Corp: Choosing the Right Corporate Structure For Your Arts Business

Areas of Professional Practice: 2.5 CLE credit hours include:

- Trademark Basics
- Managers in the Arts & Entertainment Industry
- Talent Contract Basics for the Film Industry
- Music Licensing Basics
- Sports Licensing Basics
- Legal Issues in the Sports Industry
- Legal Issues in the Music Industry

VLA Career Counseling

For more information or to schedule an appointment, call VLA Office Administrator Jonathan Tominar at (212) 319-2787 ext. 10.

In response to requests for assistance by law students and attorneys for advice about a legal career in the fields of arts and entertainment, VLA now offers private career counseling for its members. VLA's Executive Director and Director of Education schedule appointments with members for private career counseling and to review resumes and to discuss their options in exploring and reaching their desired career goals.

Volunteer Lawyers for the Arts
1 East 53rd Street, Sixth Floor
New York, NY 10022
Phone: (212) 319-ARTS (2787)
Fax: (212) 752-6575

The exclusive provider of pro bono legal services, education, mediation, and advocacy to the New York arts community.

DO THE PUBLIC GOOD
VOLUNTEER FOR PRO BONO

The Entertainment, Arts and Sports Law Section Welcomes New Members

Kristen P. Ahern
Edward A. Ambrosino
Jennifer R. Amore
Kenneth J. Anand
Ronni Lynn Arougheti
Kiesha T. Astwood
Kafui Bediako
Mitchell D. Bernstein
Robert A. Bertsche
Alethia C. Bess
Margaret E. Betten
Andrea Bianca Bezdek
Joshua D. Bilgrei
Corey Scott Biller
Joshua T. Blank
Michael J. Borrelli
Jamie L. Brilliant
Deborah K. Brown
Paul Walker Brown
Nathaniel B. Buchek
John Burr Buckman
Joseph M. Burke
Mary Beth Busichio
Vincent A. Carbonell
Peter Cellino
Michelle Christina Cerullo
Eric B. Chalif
Stephen J. Chamberlain
Kendall J. Champion
Muhunthan Chanmugham
Anne Chwat
Alyssa Clark
Vanessa Elise Coke Cohen
Charles D. Collier
Thomas J. Conroy
Dexter Christopher Cummings
Jaclene D'Agostino
Clarence Seward Darrow
Adam Davids
Bryan Jared Day
Anthony Lawrence DeLuca
Christy DeMelfi
Lisa Kristin Digernes
Brian M. Dunn
Jerrah Edwards
Rosetta E. Ellis
Avi Ellman
Gary Emmanuel
Gordon W. Esau
Daren Esposito
Floyd T. Ewing
Andrew Jay Extract
Richard C. Farley
Robert C. Farling
Frederick M. Fink
Richard M. Gabor
Erica J. Galinski
Melissa Garza
Brian H. Geller
Brian Keith Gibson
Cameron W. Gilbert
Semi Gogliormella
Varvara M. Gokea
Avitai Gold
Adam Goldstein
Robert D. Goner
Shannon Elise Goring
Sadia Nell Graham
Charlton Taggart Grant
Shari L. Greenberg
Meredith Paige Gursky
Stefan Louis Guttensohn
David Haines
Julie Christina Haley
Jesse E. Hamilton
Wendy A. Harris
Alexis Bernadette Hart
Marjorie R.m. Heidsieck
Elodie Herbel
Ana Maria Hernandez
Samantha Lyons Hetherington
Sabrina Hillson-Chosed
Francesca A. Hogi
Jeremy E. Hollander
Lorien House
Brent Michael Houston
Amin Khalil Hussain-El
Melissa A. James
Christine Jeanneret
Douglas J. Jones
Michael I. Josephs
Keiko Kato
Amy L. Katz
Angelene G. Kenton
Sagie S. Kleinlerer
Gregg M. Kligman
Vlad Kushnir
Nicholas F. Langsford
Michelle Lee
Bianca Jonea Levin
Philip Aaron Lindenbaum
Audrey H. Lipford
Jennifer Lobaito
Kevin Longo
Justin Lynch
Elizabeth A. Lyon
Richard Maluga
Kevin K. Manara
Inbal Maoz
Nicholas J Marino
Natasha Marosi
Tressa P. Marryshow
Ndidi Massay
Jolene Michelle McAuley
Gabriel McKeen
Sean McKinley
Maya Nicole Menendez
Deena R. Merlen
David S. Moricca
Andrew L. Morris
Janet P. Morris
Charles A. Moskowitz
Carrie Mroczka
Sandra M. Munoz
Kaaryn Marie Nailor
Eileen Napolitano
James Navarro
Aliya Jovan Nelson
Anita Antwi Nimoh
Jeannette Ortiz-Hausmann
Sejal Narendra Parikh
La-Verne Parris
Barbara S. Pereda
Stephanie Frances Perron
David Pilato
Chauncey Clement Gavin Pilgrim
Jon P. Pisiewski
Steven H. Pittleman
Judith Platt
Jan-Fryderyk Pleszczynski
Pavla Michaela Polcarova
Jason Potter
Lisa Michelle Poursine
Hillery Pous
Cathleen Pringle
James Prizant
Christine M. Ramos
Lee Elliott Rankin
Gary E. Redente
Kebra Ann Rhedrick
Julian D. Riley
Richard R. Rodgers
Aaron D. Rosenberg
Sherri Renee Rosenberg
Constance Yvonne Ross
Shaomei Ruan
Jessica S. Rutherford
Meredith Sales
Carlos Santiago
Elsa J. Schmidt
Debra M. Schoenberg
Evan B. Seidenstein
Michael Shah
Sohail Shahpar
Hayden Leigh Silets
Rickie L. J. Singer
Roger F. Skelton
Desmond C. F. So
Graydon Hamill Sommer
Kimberley Smith Soper
Alex McLane Soto
Daniel Stanco
George H. Stemerman
Erica J. Stien
Anthony Stiffler
Leo Strauss
Jaimie Hope Taff
Reginald S. Thompson
Kevin George Thurman
Eric Tobias
Jill K. Tomlinson
Edna Y. Torres
Tiffany A. Towers
Tara Trammell
Dean S. Travalino
Gregory Tulquois
Chad M. Van Ess
Elizabeth Van Etten
Erick William Van Tuyl
Adam S. Verstandig
Sheila Warren
Kelly Louise Wick
Gabriel Brett Wilson
Maria S. Wilson
Jeffrey Woodward
Dennis Wygmans
William Yao
Omid Zareh

Section Committees and Chairpersons

The Entertainment, Arts and Sports Law Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs or Co-Chairs for further information.

Broadcasting and Cable
Vacant

Copyright and Trademark
Alan J. Hartnick
150 East 42nd Street, 26th Floor
New York, NY 10017
(212) 949-9022

Fine Arts
Judith B. Prowda
15 West 75th Street
New York, NY 10023
(212) 496-8658

Legislation
Steven H. Richman
32 Broadway, 7th Floor
New York, NY 10004
(212) 487-5338

Literary Works and Related Rights
Jay Kogan (Co-Chair)
1700 Broadway
New York, NY 10019
(212) 636-5465

Jennifer Unter (Co-Chair)
7 West 51st Street
New York, NY 10019
(212) 541-8641

Litigation
Peter Herbert
500 5th Avenue, 33rd Floor
New York, NY 10110
(212) 921-8399

Membership
Rosemarie Tully
One Suffolk Square, Suite 430
Islandia, NY 11749
(631) 234-2376

Motion Pictures
Mary Ann Zimmer
37 West 57th Street, Suite 701
New York, NY 10019
(212) 744-7410

Music and Recording Industry
Daniel C. Marotta
277 Broadway, Suite 1310
New York, NY 10007
(212) 349-1200

New Technologies
David G. Sternbach (Co-Chair)
235 East 45th Street
New York, NY 10017
(212) 210-9791

Kenneth N. Swezey (Co-Chair)
41 Madison Avenue, 34th Floor
New York, NY 10010
(212) 974-7474

Pro Bono
Elisabeth K. Wolfe
1000 Forest Avenue
Rye, NY 10580
(917) 232-4191

Sports
Ayala Deutsch
645 5th Avenue
New York, NY 10022
(212) 407-8696

Programs
Jay Flemma (Co-Chair)
19 W. 44th Street, Suite 1108
New York, NY 10036
(212) 944-1626

Kenneth A. Nick (Co-Chair)
600 5th Avenue, 4th Floor
New York, NY 10020
(212) 632-3024

Publications
Elissa D. Hecker
51 West 86th Street, 405
New York, NY 10024
(212) 721-8166

Rights of Publicity, Privacy and Merchandising
Joshua R. Bressler
125 Broad Street
New York, NY 10004
(212) 558-7393

Theatre and Performing Arts
James Henry Ellis
36 Butler Road
Scarsdale, NY 10583
(914) 725-5514

Young Entertainment Lawyers
Jennifer Romano
36 West 44th Street
Suite 1300
New York, NY 10036
(212) 840-3422

Aaron D. Rosenberg
200 Park Avenue, 16th Floor
New York, NY 10166
(212) 801-6826

Get CLE Credit:
Write for the *EASL Journal*!

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

The New York State Bar Association's Entertainment, Arts and Sports Law Section offers many ways to enhance your knowledge and expertise through committee involvement. Committee work allows you to network with other attorneys from across the state and gives you the opportunity both to research issues and to have a real impact upon the law. Committees are also outstanding avenues to achieve professional growth and recognition for your efforts.

☐ Please consider me for appointment to the Entertainment, Arts and Sports Law Section Committees as indicated below.

☐ Please send me information on membership in the Entertainment, Arts and Sports Law Section.

Committee Assignment Request

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Broadcasting and Cable

___ Copyright and Trademark

___ Fine Arts

___ Legislation

___ Literary Works and Related Rights

___ Litigation

___ Membership

___ Motion Pictures

___ Music and Recording Industry

___ New Technologies

___ Pro Bono

___ Sports

___ Programs

___ Publications

___ Rights of Publicity, Privacy and Merchandising

___ Theatre and Performing Arts

___ Young Entertainment Lawyers

Name ____________________

Firm ____________________

Office Address ____________________

Home Address ____________________

Office Phone No. __________ Office Fax __________ Home Phone No. __________

E-mail address ____________________

Please return this application to: **Membership Services Department**
New York State Bar Association
One Elk Street
Albany, NY 12207
Telephone: 518/463-3200, ext. 5573

Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted with biographical information either via e-mail or on a 3½" diskette (preferably in WordPerfect or Microsoft Word) along with a laser-printed original. Please submit articles to:

Elissa D. Hecker
51 West 86th Street, 405
New York, NY 10024
eheckeresq@yahoo.com

WWW.NYSBA.ORG/EASL

Entertainment, Arts and Sports Law Journal

Editor
Elissa D. Hecker
51 West 86th Street, 405
New York, NY 10024

This *Journal* is published three times a year for members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. Members of the Section receive the *Journal* without charge. The views expressed in articles published in this *Journal* represent those of the authors only, and not necessarily the views of the Editor, the Entertainment, Arts and Sports Law Section or the New York State Bar Association.

ISSN 1090-8730

NYSBA

Entertainment, Arts and Sports Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

PRSRT STD
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155